SEP 25 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 443

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.
Petitioners

v.

CHARLES D. STUART, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILL WILSON
Attorney General of Texas

TOM I. McFARLING
Assistant Attorney General of Texas

SAM R. WILSON
Assistant Attorney General of Texas

LEON F. PESEK
Assistant Attorney General of Texas
Counsel for Petitioners

Baldwin Printing Company, Inc., 209 West Eighth Street, Austin

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.
Petitioners

v.

CHARLES D. STUART, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 11, 1961.

CITATIONS TO OPINIONS BELOW

Order of dismissal from the United States District Court for the Northern District of Texas is

unreported and is printed in Appendix 1-A; the first order of the Supreme Court of the United States dismissing the appeal taken there is reported at 361 U.S. 232 and is printed in Appendix 1-B; the amended order of the Supreme Court is reported at 362 U.S. 958 and is printed in Appendix 1-C hereto. The order of dismissal from the United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix 1-D. The order of Court reinstating the appeal is unreported and is printed in Appendix 1-E. The opinion of that Court denying Petitioners' Second Motion to Dismiss is reported at 282 F. 2d 539 and printed in Appendix 1-F. The opinion of the Circuit Court has not yet been reported and is set out in Appendix 1-G. The judgment of the Circuit Court is set out in Appendix 1-H.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

THE QUESTION PRESENTED

Have Respondents, who desire to diagnose, treat and attempt to cure patients in Texas, without any regulation by the State of Texas, and without first having established any qualifications, presented a substantial Federal question in this suit which attacks the constitutionality of Articles 4499-4512, Vernon's Texas Civil Statutes and Articles 739-745, Vernon's Penal Code of Texas, regulating the prac-

tice of medicine, sufficient to confer jurisdiction for the convening of a three-judge District Court, when every question presented by Respondents' complaint has already been determined adversely to Respondents' position by Federal Courts?

STATUTES INVOLVED

The Texas Statutes involved in Respondents' complaint are Articles 4499-4512, Vernon's Texas Civil Statutes, and Articles 739-745, Vernon's Penal Code of Texas. The applicable portions are set out in Appendix II.

STATEMENT

Respondents sued Petitioners in the United States District Court for the Northern District of Texas alleging, in substance, (R-1-23) that they were being deprived by Petitioners of certain rights under the Constitution and Statutes of the United States because Petitioners were enforcing Articles 4499-4512, Vernon's Texas Civil Statutes, and Articles 739-745, Vernon's Penal Code of Texas, regulating the practice of medicine against them. No attempt to comply with any provisions of these, or any other State Statutes was alleged by Respondents. They merely alleged that they, as so-called Naturopathic physicians, were deprived of their livelihood and certain constitutional rights by the enforcement of these regulatory statutes because the statutes were unreasonable and arbitrary as to them. Furthermore, the State of Texas was denying them certain of their rights by failing to provide special legisla-

tive authorization to practice their so-called Healing Art as an exception to the general medical practice regulations. [1]

Upon motion, (R-23-29) the Judge of the District Court dismissed the case for "lack of a substantial Federal question warranting exercise of jurisdiction and no facts are alleged entitling the Plaintiffs to any relief in this civil action." (R-41-42; also, Appendix 1-A)

Respondents appealed this dismissal to the Supreme Court of the United States and made a simultaneous appeal to the Court of Appeals for the Fifth Circuit.

In Cause No. 495, October Term, 1959, the Supreme Court granted Petitioners' Motion to Affirm or Dismiss and the appeal was dismissed "for want of a substantial Federal question." (Appendix 1-B) Whereupon, the Court of Appeals granted Petitioners' Motion and dismissed the appeal there as being moot, since the Supreme Court had already decided the case. (R-55, also Appendix 1-D)

Then, on motion of Respondents, the Supreme Court recalled and amended their previous order

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[1] Texas at one time had a special act regulating the practice of naturopathy, but such act, Article 4590d, Vernon's Texas Civil Statutes, was held to be violative of the Texas Constitution; See: *Wilson v. State Board of Naturopathic Examiners*, 298 S.W.2d 946; (Civ. App. 1957, err. ref.'d., no reversable error, Supreme Court of Texas; Certiorari denied, 355 U.S. 870, rehearing denied, 355 U.S. 920).

of dismissal. Though still granting Petitioners' Motion to Dismiss, the amended order recited the appeal was dismissed ". . . for want of jurisdiction", and the statement concerning ". . . want of a substantial Federal question," in the first order of dismissal, was eliminated in the amended order. (Appendix 1-C)

Pursuant to the Supreme Court's amended order, the Court of Appeals, upon Respondents' motion, reinstated the appeal in that Court, (R-67-68, also, Appendix 1-E) and, after overruling Petitioners' Second Motion to Dismiss, (R-89-93, also, Appendix 1-F) reversed and remanded the case to the District Court. (R-98-A, also, Appendix 1-H) The opinion recites: "We believe that a substantial Federal question has been raised in this case warranting a trial before a three-judge court." (R-95-98; also, Appendix 1-G) Petitioners' Motion to Stay Issuance of Mandate (R-99-100) was granted (R-101) on August 28, 1961, for a period of 30 days.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals is at variance with the construction of Texas Statutes made by the highest Appellate Courts of Texas, and determines Federal law in conflict with prior decisions of this Court.

Texas does not authorize or regulate the practice of Naturopathy as a separate, distinct or limited segment of the healing arts. In Texas, the diagnosing, treating or curing of human ailments for pay

— by any principal — including the principle of Naturopathy, is considered to be the practice of medicine as the term is defined by Article 4510, Vernon's Texas Civil Statutes (Appendix II, page 31-II). See *Wilson v. State Board of Naturopathic Examiners*, (Civ. App.) 298 S.W.2d 946 (writ of error refused, no reversal error, Supreme Court of Texas; certiorari denied 355 U.S. 870, rehearing denied, 355 U.S. 920); *Schlichting v. Texas State Board of Medical Examiners*, Supreme Court of Texas, 158 Tex. 279, 310 S.W.2d 557 (1958).

Articles 4499-4512, Vernon's Texas Civil Statutes, and Articles 739-745, Vernon's Penal Code of Texas, (Appendix II), regulate the practice of medicine, as so defined, not only by those who hold degrees of Doctor of Medicine, but also the practice of medicine by those who subscribe to other philosophies of treatment; for example, those who are Doctors of Osteopathy, those who are Homeopathic physicians, those who are Naturopathic physicians, and those who are Eclectic physicians. Should any of Respondents comply with this basic standard of competence prescribed by the Legislature of Texas, they could be licensed and would be authorized to practice medicine, as so defined, and in their practice, could utilize the principles of Naturopathy, if they so desired.

To find a substantial Federal question, the Court of Appeals must interpret and construe these Texas Statutes in a manner entirely inconsistent with the construction placed thereon by the Supreme Court

of Texas, contrary to 28 U.S.C. Section 1652. See *Schlichting v. State Board of Medical Examiners*, Sup. Ct. of Texas, 158 Tex. 279, 310 S.W. 2d 557 (1958); *Wilson v. State Board of Naturopathic Examiners*, 290 S.W. 2d 946 (Civ. App., 1957, error refused, no reversable error, Sup. Ct. of Texas; certiorari denied, 355 U.S. 870, rehearing denied, 355 U.S. 920).

The Court of Appeals permits Respondents to test, in Federal Courts, the judgments, interpretations and determinations of Texas Statutes by Texas Courts that rest on adequate and independent State grounds. See *Black v. Cutter Laboratories* 351 U.S. 292; *Herb v. Pitcairn*, 324 U.S. 117, *Klinger v. State of Missouri*, 13 Wall. (U.S.) 257; *Murdock v. Memphis*, 20 Wall. (U.S.) 590; *Berea College v. Kentucky*, 211 U.S. 45; *Enterprise Irregation District v. Farmers Mutual Canal Company*, 243 U.S. 157; *Fox Film Corporation v. Muller*, 296 U.S. 207. The applicability, interpretation, and effect of State statutes or constitutional provisions being a question of local law and not Federal law, the judgments and interpretations by the State Courts thereon are not subject to review by Federal Courts unless such interpretation violates the United States Constitution. *Knights of Pythias v. Meyer*, 265 U.S. 30; *Hotel & R. Employees International Alliance v. Wisconsin Employee Relation Board*,, 315 U.S. 437; *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673; *Morehead v. New York*, 298 U.S. 587; *Senn v. Tile Layers Protective Union*, 301 U.S. 468; *Moore v. Illinois Central R. Co.*, 312 U.S. 630.

The only question, therefore, properly cognizable by Federal Courts is whether the Texas Statutes, as so interpreted, contravene any of Respondents' Constitutional rights, or any rights established by Federal Statutes.

The decision of the Court of Appeals is contrary to the Federal cases holding that a State may establish minimum levels of competence for those who would diagnose and treat human ailments by enacting reasonable regulations based upon reasonable qualifications. See:*Graves v. Minnesota*, 1926, 272 U.S. 425; *Douglas v. Noble*, 1923, 261 U.S. 165; *Dent v. West Virginia*, 1889, 129 U.S. 114; *Williamson v. Lee Optical Co.*, 1955, 348 U.S. 483; *Semler v. Oregon State Board of Dental Examiners*, 1935, 294 U.S. 608; *Dantzler v. Callison*, S. Car. 1956, 94 S. E. 2d 177, dismissed per curiam for want of a substantial Federal question, 1956, 352 U.S. 939; *Hitchcock v. Collenberg*, 1956, 140 F. Supp. 894, aff'd per curiam, 1957 353 U.S. 919; *Taylor v. Oklahoma*, S. Ct. Okla. 1955, 291 P. 2d 1033, dismissed per curiam for want of a substantial Federal question, 1956, 352 U.S. 805; *Missouri v. Robert G. Errington*, S.Ct Missouri, 317 S.W. 2d 326, Cert. denied, 1958, 359 U.S. 892.

The Texas Statutes regulating the practice of medicine have already been found to be reasonable regulations by this Court. *Collins v. Texas*, 223 U.S. 288 (1912). Every question presented by Respondents from which the Court of Appeals has found a substantial Federal question has been answered

in detail by Federal Courts with uniform results contrary to Respondents' contentions.

The Court of Appeals has found a substantial Federal question in Respondents' complaint,[2] even though each and every one of Respondents' arguments relating to the Constitution or Statutes of the United States were thoroughly considered and rejected in *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Maryland, 1956); affirmed per curiam 353 U.S. 919, 77 S. Ct. 679. *Hitchcock* arose in Maryland but the Texas statute is substantially the same as the Maryland act. Also see *Wilson v. State Board of Naturopathic Examiners*, 290 S.W. 2d 946, (Civ. App., 1957, error refused, no reversable error, Supreme Court of Texas; cert. denied 355 U.S. 870, rehearing denied 355 U.S. 920).

The judgment of the Court of Appeals is contrary to *California Water Service Co. v. City of Redding*, 1938, 304 U.S.; 252 and to *Stone v. Christensen*, 1940, 36 F. Supp. 739 which establish that a Federal question may not be *substantial* when the question has already been uniformly decided by Federal Courts.

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[2] A few months before the complaint was filed, one of the Respondents, Lonnie Keahey, was convicted of the offense of Unlawful Practice of Medicine, (arising out of the Statutes he here attacks in this suit). The conviction was affirmed by the Court of Criminal Appeals of Texas, *Keahey v. State*, 327 S.W. 2d 759. After the date of filing of this case in Federal Court, the Supreme Court had occasion to review the conviction. See: *Keahey v. Texas*, Certiorari denied, Oct. 12, 1959, 361 U.S. 830, rehearing denied, Nov. 23, 1959, 361 U.S. 904.

The Court of Appeals has abrogated Article 4590c, Vernon's Texas Civil Statutes, (Appendix III). This statute is separate and distinct from the statutes Respondents attack and is not in issue in this case or even mentioned by Respondents in their complaint. Unless brought in issue, it is presumptively valid. That Article, the Basic Science Law, prohibits anyone in Texas, including Respondents, from treating or offering to treat patients without first having a certificate of compliance. Respondents have not attacked such statute nor plead compliance with it. Even if every Texas Statute Respondents complain of were invalid, Respondents still could not treat sick people in Texas because of non compliance with Article 4590c Vernon's Texas Civil Statutes. The Court of Appeals has exempted Respondents from the purview of this statute and has invalidated a Texas Statute of which Respondents do not complain. In so doing, the Court of Appeals has sustained a plea of unconstitutional discrimination without requiring Respondents to show they are affected by the alleged discrimination.[3]

The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

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[3] The Court of Appeals held (Appendix 1-F) that the District Judge had jurisdiction to scrutinize the Complaint to ascertain the existence of a substantial Federal question before convening a three-judge District Court. This was done, and, finding none, the complaint was dismissed. Therefore, the judgment of the Court of Appeals goes to the merits of the case, and is not a reversal for a mere procedural irregularity.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

TOM I. McFARLING
Assistant Attorney General
of Texas

SAM R. WILSON
Assistant Attorney General of Texas

LEON F. PESEK
Assistant Attorney General
of Texas

Counsel for Petitioners
Capital Station

Austin, Texas

CERTIFICATE

This is to certify that I am a member of the Bar of this Honorable Court, and that I have served copies of the above and foregoing Application for Writ of Certiorari on Counsel for Respondents, Mr. James L. McNees, Jr., 407 Davis Building, 1309 Main Street, Dallas, Texas, by placing the same in the United States Air Mail, postage prepaid, on this the _____ day of September, 1961.

LEON F. PESEK

APPENDIX I

APPENDIX I-A

ORDER DISMISSING ACTION

Filed July 29, 1959.

In the United States District Court for the Northern District of Texas, Dallas Division.

Charles D. Stuart, et al., Petitioners,

vs. Civil Action No. 8084.

Will Wilson, Attorney General of the State of Texas, and Texas State Board of Medical Examiners, and Henry Wade, District Attorney of Dallas County, Texas, Defendants.

On this the 25th day of July, 1959, came on to be heard Plaintiffs' First Amended Complaint and Petition for Permanent Injunction and Application for Temporary Restraining Order and Temporary Injunction, and Defendants' First Amended Motion to Dismiss and to Strike, in the above styled Civil Action on the docket of this Court. Came the Plaintiffs, by and through their attorney, and came the Defendants, by and through their attorney, and both parties announced ready for the hearing. The Court, having heard both the Plaintiffs' Complaint and Application and the Defendants' Motion and the argument of counsel, is of the opinion, and so finds, that this said Civil Action should be dismissed for lack of a substantial federal question

warranting exercise of jurisdiction and no facts are alleged entitling the Plaintiffs to any relief in this said Civil Action.

It Is, Therefore, Ordered that Civil Action Number 8084, styled Charles D. Stuart, et al., Petitioners, vs. Will Wilson, Attorney General of the State of Texas, and Texas State Board of Medical Examiners, and Henry Wade, District Attorney of Dallas County, Texas, Defendants, be, and the same is, dismissed at the Plaintiffs' costs; and the Clerk of this Court is hereby directed to make the necessary entries on the docket and records of this Court to dismiss this said Civil Action.

Signed, Entered and Filed, this 29 day of July, 1959.

T. WHITFIELD DAVIDSON,
(T. Whitfield Davidson),
U. S. District Judge.

APPENDIX I-B

STUART ET AL. V. WILSON, ATTORNEY GENERAL OF TEXAS ET AL.

-U. S.-

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 495. Decided January 11, 1960.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

APPENDIX I-C

STUART ET AL. V. WILSON, ATTORNEY GENERAL OF TEXAS ET AL.

- U. S. -

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 495. Decided April 25, 1960.

PER CURIAM.

The motion to recall and amend judgment is granted. The order of January 11, 1960, is vacated and the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

APPENDIX I-D

ORDER DISMISSING THE APPEAL AS MOOT.
FILED FEBRUARY 17, 1960

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18031

CHARLES D. STUART, ET AL.,
Appellant,

versus

WILL WILSON, ATTORNEY GENERAL
OF TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

ORDER:—

It appearing that the Supreme Court has already decided this case on appeal, the attempted appeal to this Court has become moot, and the same is dismissed. The time within which appellant may apply for a rehearing is extended so that any such application may be made within fifteen days after the ruling of the Supreme Court of the United States on the petition for rehearing filed in that Court.

Appeal dismissed.

Enter for the Court this February 17, 1960.
(signed) RICHARD T. RIVES,
Chief Judge, U. S. Court of Appeals,
Fifth Circuit.

APPENDIX I-E

ORDER SETTING ASIDE THE ORDER OF DISMISSAL AND REINSTATING THE APPEAL - FILED JULY 6, 1960

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18031

CHARLES D. STUART, ET AL.,
Appellants,

versus

WILL WILSON, Attorney General of the State of Texas, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

(JULY 6th, 1960)

Before RIVES, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

PER CURIAM:

The Supreme Court of the United States, on an attempted appeal of this case direct from the District Court, entered an order on January 11, 1960, as follows: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Consequently, on February 17, 1960, this Court entered an order as follows:

> "It appearing that the Supreme Court has already decided this case on appeal, the attempted appeal to this Court has become moot, and the same is dismissed. The time within which Appellant may apply for a rehearing is extended so that any such application may be made within fifteen days after the ruling of the Supreme Court of the United States on the Petition for Rehearing filed in that Court."
>
> "Appeal dismissed."

The Supreme Court on April 25, 1960, entered a further order in the attempted appeal to that Court, as follows:

> "The Motion to Recall and Amend Judgment is granted. The Order of January 11, 1960, is vacated and the Motion to Dismiss is granted and the appeal is dismissed for want of jurisdiction."

The appellants filed their petition for rehearing in this Court, to which the appellees replied stating: "Appellees do not resist the Petition for Rehearing insofar as it relates to reinstatement of this cause upon the Docket of this Court."

At the same time the appellees filed a second motion to dismiss this appeal based upon different grounds.

Upon consideration, it is now ordered by the Court that the order of February 17, 1960, dis-

missing this appeal be set aside, and that the appeal be reinstated on the docket of this Court. It is further ordered that the case be taken under submission on the second motion to dismiss the appeal, and that briefs, which may be typed or mimeographed, are requested from the parties. Appellees' brief in support of such motion may be filed within twenty (20) days from the date of this order, and appellants' brief in opposition to such motion may be filed within twenty (20) days after the receipt of a copy of appellants' brief.

APPEAL REINSTATED.

APPENDIX I-F

OPINION OF THE COURT DENYING SECOND MOTION TO DISMISS THE APPEAL. FILED SEPTEMBER 14, 1960

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18031

CHARLES D. STUART, ET AL.,
Appellants,

versus

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(September 14, 1960)

Before RIVES, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

PER CURIAM: This case is submitted for decision on briefs in support of and in opposition to the appellees' second motion to dismiss the appeal.

Initially the complaint in the district court was filed by some 92 persons, who described themselves

as "all naturopathic physicians." They claimed to be pursuing a lawful occupation, and sought, inter alia, to enjoin the Texas State Board of Medical Examiners, the Attorney General of Texas, and the District Attorney of Dallas County, Texas, from enforcing the Texas Medical Practice Act, Articles 4495-4512, Texas Revised Civil Statutes, upon the ground that that statute and its enforcement were violative of several provisions of the Constitution of the United States. The complaint sought the convening of a three-judge district court to hear the case. Instead, the one-judge district court, after hearing arguments, ordered the action dismissed for lack of a substantial federal question warranting exercise of jurisdiction.

In their second motion to dismiss the appeal the appellees urge that *Stratton, Secretary of State of Illinois v. St. Louis S.W. Ry. Co.*, 1930, 282 U.S. 10, is fatal to jurisdiction on direct appeal not only to the Supreme Court of the United States, but also to the Court of Appeals. Appellees insist that the only remedy possible available to the appellants is writ of mandamus from the Supreme Court.

In the *Stratton* case, supra, the Court held that a single judge has no jurisdiction to entertain a motion to dismiss such a complaint "on the merits," but stated also that the statute providing for a three-judge district court ". . . applies only where there is a substantial claim of invalidity under the Federal Constitution. . ."

In *Ex parte Proesky, 1933*, 290 U. S. 30, 32, the Court made it clear that a single-judge district court always has authority to dismiss for want of jurisdiction when the federal question lacks the necessary substance and no other ground of jurisdiction appears. To like effect is *California Water Service Co. v. City of Redding*, 1938, 304 U.S. 252, 254-255.

As said in *J. B. Schermerhorn, Inc. v. Holloman*, 10 Cir. 1934, 74 F.2d 265, 266:

> "A trial judge is authorized to determine in the first instance whether a case is one requiring disposition by a special court convened in accordance with the statute, and he is not required to call two additional judges to his assistance unless the case is of that nature. *Ex parte Williams*, 277 U.S. 267,48 S.Ct. 523, 72 L.Ed. 877; *Independent Gin & Warehouse Co. v. Dunwoody* (D.C.) 30 F. (2d) 306; *Ross v. Goodwin* (D.C.) 40 F.(2) 532; *Green v. Hart* (D.C.) 41 F. (2d) 854; *United States B. & L. Ass'n v. McClelland* (D.C.) 6 F. Supp. 299. His decision upon the question is subject to review."

The case of *Wicks v. Southern Pacific Co.*, 9 Cir., 1956, 231, F.2d 130, 134, 135, seems directly in point, and we therefore quote at some length:

> "On authority of *Stratton v. St. Louis S.W. Ry. Co.*, supra, it is urged to us that a single district judge acts without jurisdiction when he grants summary judgment and dismissal of an action where the complaint raises the question of constitutionality of an Act of Congress by seeking relief in the form of 'an interlocutory or perma-

nent injunction restraining the enforcement, operation or execution of any Act of Congress for repungnance to the Constitution of the United States * * *.' 28 U.S.C.A. §2282. In reliance upon the Stratton case, supra, appellants now urge that the appropriate procedure following such action by the lower court was for them not to appeal to this Court (since it would lack jurisdiction in such an appeal) but rather to directly petition the Supreme Court for mandamus directing the district court judge to convene a three-judge court.

"We have found no case which adequately discusses and disposes of the precise issue thus tendered here, that is to say, the power of this Court to entertain an appeal from the refusal by the lower court to convene a three-judge court, and the granting of summary judgments and dismissals by the district judge. But we conclude that the cases called to our attention fail to sustain the jurisdictional contentions of appellants.

"From a reading of the Stratton and Proesky cases, supra, we are of the opinion that the trial judge sitting alone may initially determine if there is a 'substantial' federal constitutional issue presented by a complaint which seeks an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress as being repugnant to the United States Constitution. We believe that a single district judge may dismiss a complaint if he decides that a substantial constitutional issue is not raised therein. It is only where a single district judge decides that a complaint raises a substantial constitutional issue and proceeds to decide that issue on its merits, that he

> acts without jurisdiction. The remedy for such action is to seek mandamus from the Supreme Court to compel the convening of a three-judge court to hear and decide the substantial constitutional issue in the case on its merits."

See also *Board of Supervisors of L.S.U., et al., vs. Tureaud*, 5 Cir., 1955, 225 F.2d 434, certiorari denied 351 U.S. 924; 1 Moore's Federal Practice, 2d ed., Sec. 0.205, p. 2233, n. 11.

The judgment of the district court is not "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction" which will support a direct appeal to the Supreme Court (28 U.S.C.A. §1253). It is a final decision of the district court which will support an appeal to the Court of Appeals (28 U.S.C.A. §1291).

The second motion to dismiss the appeal is denied.

MOTION DENIED.

JUDGE CAMERON CONCURS IN THE RESULT.

APPENDIX I-G

OPINION OF THE COURT—FILED AUGUST 11, 1961

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18031

CHARLES D. STUART, ET AL.,
Appellants,

versus

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.
(August 11, 1961)

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

HANNAY, District Judge: This suit was instituted in the United States District Court for the Northern District of Texas by 92 plaintiffs who term themselves "naturopathic physicians". They sought to enjoin the Texas State Board of Medical Examiners, the Attorney General of Texas, and the District Attorney of Dallas County, Texas from

enforcing the provisions of Articles 4495-4512, Texas Revised Civil Statutes, commonly known as the Texas Medical Practice Act.

Petitioners, hereinafter called appellants, also sought to have this action tried before a three-judge court, claiming that this case comes within the requirements of Title 28, U.S.C.A. 2281-2284.

Appellants attack the Texas Medical Practice Act on the grounds that it violates the United States Constitution, particularly the Preamble, Section 2 of Article IV, and Article VI of the Constitution of the United States, Section 1 of the XVI Amendment; also, the Anti-Trust Laws of the United States and the Constitution of the State of Texas Section 31 of Article 16.

The trial judge, after a hearing on the pleadings only, dismissed the action for the stated reason that there was no substantial federal question involved and the federal court was without jurisdiction.

Thereafter appellants gave notice of appeal both to the United States Court of Appeals for the Fifth Circuit and to the Supreme Court of the United States. The appeal to the Supreme Court was pursuant to Title 28, U.S.C.A., Section 1253, which authorizes a direct appeal to the Supreme Court from decisions of three-judge district courts. The Supreme Court dismissed the appeal on January 11, 1960, for want of a substantial federal question. On February 17, 1960, this court granted appellees' first motion to dismiss the appeal and granted ap-

pellants an extended time in which to file petition for rehearing. On July 6, 1960, this court reinstated the appeal. Appellees filed a second motion to dismiss the appeal based upon different grounds. Appellees' second motion to dismiss was denied by this court in a per curiam opinion dated September 14, 1960.

The district judge's dismissal of the case for want of a substantial federal question was ruled to be a final decision which would support an appeal to this court. It is the contention of appellants that this action is controlled by *England v. Louisiana State Board of Medical Examiners*, 259 F. 2d 626, rehearing denied in written opinion 263 F. 2d 661, writ of cer. den. 359 U.S. 1012. This court decided that the question of whether the State Statutes of Louisiana were unreasonable and arbitrary in regulating the qualifications for practice in medicine as it applies to chiropractors raised a substantial federal question which could only be decided in a hearing before a duly constituted three-judge court.

First, it is the appellees' contention that the Texas Medical Practice Act has heretofore been construed and that it was held to be constitutional. See *Schliching v. Texas State Board of of Medical Examiners*, 310 S.W. 2d 557; *Collins v. Texas*, 223 U.S. 288; *Keahey v. Texas*, 327 S.W. 2d 759.

Secondly, that 28 U.S.C.A. 1652 provides:

> "State Laws as Rules of Decision. The laws of the several states, except where the constitution

> or treaties of the United States or acts of Congress otherwise provide, shall be regarded as rules of decision in Civil Actions in courts of the United States, in cases where they apply."

See *Wilson v. State Board of Naturopathic Examiners*, 298 S.W. 2d 946.

Thirdly, that appellants do not state sufficient facts to entitle them to practice any healing art under Article 4590, Texas Revised Civil Statutes, known as the Basic Science Law.

Fourthly, that the anti-trust laws of the United States do not apply to State activities. See *Hitchcock v. Collenberg*, 149 F.Supp. 894, cer.den. 353 U.S. 919.

We believe that a substantial federal question has been raised in this case warranting a trial before a three-judge court. The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX I-H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term 1960

No. 18031

D. C. Docket No. 8084 Civil

CHARLES D. STUART, ET AL.,
Appellants,

versus

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before Cameron and Brown, Circuit Judges, and Hannay, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this

cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Will Wilson, Attorney General of the State of Texas, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 11, 1961

Issued:

APPENDIX II

Here follows the Texas Medical Practice Act consisting of Chapter 6, Title 71 of the Revised Civil Statutes of Texas, 1925, as amended. (For a discussion of what constitutes the Texas Medical Practice Act, see Schlichting v. Texas State Board of Medical Examiners, *310 S.W. 2d 557 (1958).*

* * *

Art. 4495. Medical board

The Texas State Board of Medical Examiners shall consist of twelve men, learned in medcine, legal and active practioners in the State of Texas, who shall have resided and practiced medicine in this State, under a diploma from a legal and reputable college of medicine of the school to which said practioner shall belong, for more than three years prior to their appointment on said Board. No school shall have a majority representation on said Board. Within thirty days after this Act becomes effective, the members of the first Board, as provided in this Act, shall be appointed by the Governor of the State Of the members first appointed, four shall serve for a term of two years, or until their successors shall be appointed and qualified; four shall serve for a term of four years, or until their successors shall be appointed and qualified; and the remaining four members shall serve for a term of six years, or until their successors shall be appointed and qualified. Thereafter, at the expiration of the term of each member of the Board first appointed, his successor shall be appointed by the Governor of the State, and shall serve for a term of six years, or until his successor shall be appointed and qualified. The present members of the State Board of Medical Examiners, as created by Article 4495, Revised Statutes of 1925, shall remain in office until the members of the Texas State Board of Medical Examiners

provided for in this Act shall have been appointed by the Governor and shall have qualified. No member of said Texas State Board of Medical Examiners shall be a stockholder or a member of the faculty or a board of trustees of any medical school. Vacancies occurring in the Board shall be filled by the Governor. The word "medicine," as used in this Article, shall have the same meaning and scope as is given to it in Article 4510, Revised Civil Statutes of 1925.

Art. 4496. Organization and meetings

. . .

Art. 4497. Board shall keep register

The board shall preserve a record of its proceedings in a book kept for that purpose, showing name, age, place and duration of residence of each applicant, the time spent in medical study in respective medical schools, and the year and school from which degrees were granted; said register shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The Secretary of the board shall on March 1 of each year, transmit an official copy of said register to the Secretary of State for permanent record, a certified copy of which, with hand and seal of the secretary of said board, or the Secretary of State, shall be admitted in evidence in all courts. Id. Sec. 3.

Art. 4498. Physicians to register

It shall be unlawful for any one to practice medicine, in any of its branches, upon human beings within the limits of this State who has not registered in the District Clerk's office of every County in which he may reside, and in each and every County in which he may maintain an office or may designate a place for meeting, advising with, treat-

ing in any manner, or prescribing for patients, the certificate evidencing his right to practice medicine, as issued to him by the Texas State Board of Medical Examiners, together with his age, post office address, place of birth, name of medical college from which he graduated, and date of graduation, subscribed and verified by oath, when, if wilfully false, shall subject the affiant to conviction and punishment for false swearing, as provided by law. The fact of such oath and record shall be endorsed by the District Clerk upon the certificate. The holder of every such certificate must have the same recorded upon each change of residence to another county, as well as in each and every County in which he may maintain an office, or in which he may designate a place for meeting, advising with, treating in any manner or prescribing for patients; and the absence of such record in any place where such record is hereby required shall be prima facie evidence of the want of possession of such certificate.

Art. 4498a.
(See Text of this Article as amended in H.B. 254, ante).

Art. 4499
(See H.B. 254).

Art. 4499a
(See H.B. 254).

Art. 4500
(See H.B. 254).

Art. 4501
(See H.B. 254).

Art. 4502
(See H.B. 254).

Art. 4503. Details of examinations

All examinations for license to practice medicine shall be conducted in writing in the English language, and in such manner as to be entirely fair and impartial to all individuals and to every school or system of medicine. All applicants shall be known to the examiners only by numbers, without names, or other method of identification on examination papers by which members of the Board may be able to identify such applicants or examinees, until after the general averages of the examinees' numbers in the class have been determined, and license granted or refused. Examinations shall be conducted on anatomy, physiology, chemistry, histology, pathology, bacteriology, diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Upon satisfactory examination conducted as aforesaid under the rules of the Board, applicants shall be granted license to practice medicine. All questions and answers, with the grades attached, authenticated by the signature of the examiner, shall be preserved in the executive office of the Board for one year. All applicants examined at the same time shall be given identical questions. All certificates shall be attested by the seal of the Board and signed by all members of the Board, or a quorum thereof. The Board may in its discretion give examination for license in two (2) parts. The first part shall include such of the required scientific branches of medicine above-named as may be presented by the Board. The second, or final, part of the examination shall not be given until the applicant has graduated and has received a diploma from a reputable medical college, as the term, "reputable medical college," is defined in Article 4501 of the Revised Civil Statutes of Texas of 1925, as amended by this Act. The Board may in its discretion admit to partial examination applicants who have successfully completed the work of the first two (2) years of the college course required of licentiates. The application for partial examination must be in writing, accompanied by an affidavit made by the dean or registrar, of a reputable medical college within the meaning of the law, showing that

the applicant has successfully completed the work of the first two (2) years of said course, and by a fee of Fifteen Dollars ($15). The Board may prescribe all other prerequisites of such applications. No license shall be granted to any applicant who has successfully passed such partial examination until all legal requirements for granting license have been complied with. All partial examinations must be conducted in the same manner and under the same rules prescribed for complete, or full, examination. The fee for second, or final, examination shall be Twenty-five Dollars ($25).

Art. 4504. Construction of this law

Nothing in this Chapter shall be so construed so as to discriminate against any particular school or system of medical practice, nor to affect or limit in any way the application or use of the principles, tenets, or teachings of any church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided further, that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members. The provisions of this Chapter do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry; nor to duly licensed optometrists, who confine their practice strictly to optometry as defined by Statutes; nor to duly licensed chiropractors, who confine their practice strictly to chiropractic as defined by Statute; nor to nurses who practice nursing only; nor to duly licensed chiropodists, who confine their practice strictly to chiropody as defined by Statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract surgeons of the United States Army, Navy, or Public

Health and Marine Hospital Service, in the performance of their duties, and not engaged in private practice; nor to legally qualified physicians of other states called in consultation, but who have no office in Texas, and appoint no place in this State for seeing, examining or treating patients. This law shall be so construed as to apply to persons other than registered pharmacists of this State not pretending to be physicians who offer for sale on the streets or other public places contraceptives, prophylactics or remedies which they recommend for the cure of disease.

Art. 4505. May refuse to admit certain persons

The State Board of Medical Examiners may refuse to admit persons to its examinations, and to issue license to practice medicine to any person, for any of the following reasons:

(1) The presentation to the Board of any license, certificate, or diploma, which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

(2) Conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion.

(3) Habits of intemperance, or drug addiction, calculated, in the opinion of the Board, to endanger the lives of patients.

(4) Grossly unprofessional or dishonorable conduct, of a character which in the opinion of the Board is likely to deceive or defraud the public.

(5) The violation, or attempted violation, direct or indirect, of any of the provisions of this Act, either as a principal, accessory, or accomplice.

(6) The use of any advertising statement of a character tending to mislead or deceive the public.

(7) Advertising professional superiority, or the performance of professional service in a superior manner.

(8) The purchase, sale, barter, or use, or any offer to purchase, sell, barter, or use, any medical degree, license, certificate, diploma, or transcript of license certificate, or diploma, in or incident to an application to the Board of Medical Examiners for license to practice medicine.

(9) Altering, with fraudulent intent, any medical license, certificate, diploma, or transcript of medical license, certificate, or diploma.

(10) The use of any medical license, certificate, diploma, or transcript of any such medical license, certificate, or diploma, which had been fraudulently purchased, issued, counterfeited, or materially altered.

(11) The impersonation of, or acting as proxy for, another in any examination required by this Act for a medical license.

(12) The impersonation of a licensed practioner, or permitting, or allowing, another to use his license, or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured, or afflicted human beings.

(13) Employing, directly or indirectly, any person whose license to practice medicine has been suspended, or association in the practice of medicine with any person or persons whose license to practice medicine has been suspended, or any person who has been convicted of the unlawful practice of medicine in Texas or elsewhere.

Any applicant who may be refused admittance to examination shall have his right to have such issue tried in the District Court of the county in which he resides or in which any Board member resides. All orders of the Board shall be prima facie valid.

Art. 4506.

(See H.B. 254).

Art. 4507.
(See H.B. 254).

Art. 4508.
(See H.B. 254).

Art. 4509.
(See H.B. 254).

Art. 4510.
(See H.B. 254).

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practioners," "practioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

Art. 4512. Malpractice cause for revoking license

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they use the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

* * * * *

The following is the text of House Bill 254, Acts of the 53rd Legislature of Texas, 1953, ch. 426, p. 102, which was a comprehensive amendment to the Texas Medical Practice Act, and to Chapter 6, Title 12, Revised Penal Code of Texas, 1925 (Articles 739-745, Penal Code.)

CHAPTER 426

H. B. No. 254

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 4498a of the Revised Civil Statutes of Texas, 1925,[1] be amended, and is hereby amended to read as follows:

"Article 4498a.

"Section 1. It shall be the duty of all persons now lawfully qualified to practice medicine in this State as defined in Article 4510, Revised Civil Statutes of 1925, or who shall hereafter be licensed for such practice by the Texas State Board of Medical Examiners, to be registered as such practioners with the Texas State Board of Medical Examiners on or before the First day of January, A.D., 1932, and thereafter to register in like manner annually, on or before the First day of January of each succeeding year. Each person so registering with the Texas State Board of Medical Examiners shall pay, in connection with each annual registration and for the receipt hereinafter provided for, a fee of Five Dollars ($5), which fee shall accompany the application of every such person for such registration Such payment shall be made to the Texas State Board of Medical Examiners. Every person so registering shall file with the Texas State Board of Medical Examiners a written application for annual registration, setting forth his full name, his age, his Post Office address, his place of resi-

[1] Vernon's Ann.Civ.St. art. 4498a.

dence, the county or counties in which his certificate entitling him to practice medicine has been registered, and the place or places where he is engaged in the practice of medicine, as well as the school of medicine to which he professes to belong and the number and date of his license certificate. All persons desiring to serve as interns or residents at hospitals in this State shall register with the Texas State Board of Medical Examiners within thirty (30) days after beginning their service as a resident or intern, and shall pay a registration fee of One Dollar ($1) to the Texas State Board of Medical Examiners. Upon termination of said internship or residency, notification of such termination shall be given within thirty (30) days to the Texas State Board of Medical Examiners. Registration as an intern or resident does not authorize the practice of medicine as defined by law unless the other provisions regulating the practice of medicine have been complied with.

"When a licensee under this Act shall have failed to pay his annual registration fee by March 1st, it shall be the duty of the Board, acting through its Secretary, to notify such licensee at his last known address by registered mail that his annual registration fee is due and unpaid. Fifteen (15) days after date of mailing such notice, it shall be the duty of the Board, acting through its Secretary, to suspend his license for non-payment of the annual registration fee and to notify such licensee of such suspension by registered letter addressed to his last known address. If the said registration fee is not then paid within thirty (30) days from date of such notice of suspension, the Board shall then cancel such license. Practicing medicine as defined in Article 4510, Revised Civil Statutes of Texas, without an annual registration receipt for the current year as provided herein shall have the same force and effect and be subject to all penalties of practicing medicine without a license. After the Board shall have declared a license cancelled as provided herein, the Board may thereafter in its discretion

refuse to issue a new license until such licensee has passed the regular examination for license as provided in this Act.

"Upon receipt of such application, accompanied by the registration fee of Five Dollars ($5), the Texas State Board of Medical Examiners, after ascertaining, either from the records of the Board or from other sources deemed by it to be reliable, that the applicant is a licensed practitioner of medicine in this State, shall issue to the applicant an annual registration receipt, certifying that the applicant has filed such application and has paid the registration fee mentioned for the year in question; provided, that the filing of such application, the payment of the registration fee, and the issuance of such receipt shall not entitle the holder thereof to lawfully practice medicine within the State of Texas, unless he has in fact been previously licensed as such practitioner by the Texas State Board of Medical Examiners, as prescribed by law, and has recorded his license certificate entitling him to practice, as issued by said Board, in the District Clerk's Office of the several counties in which the same may be required by law to be recorded, and unless his license to practice medicine is in full force and effect; and provided further that, in any prosecution for the unlawful practice of medicine as denounced in Chapter 6, Title 12, of the Penal Code of Texas, such receipt showing payment of the annual registration fee required by this Act shall not be treated as evidence that the holder thereof is lawfully entitled to practice medicine.

"Section 3.[1] All annual registration fees collected by the Texas State Board of Medical Examiners under this Act shall be placed in the State Treasury, to the credit of a special fund to be known as the 'Medical Registration Fund', and the Comptroller shall upon requisition of the Board from time to time draw warrants upon the State Treasurer for the amounts, specified in such requisition;

[1] There is no Section 2 to Article 4498a.

provided, however, the fees from this Medical Registration Fund shall be expended as specified by itemized appropriation in the General Departmental Appropriation Bill, and shall be used by the Texas State Board of Medical Examiners, and under its direction, in the enforcement of the laws of this State prohibiting the unlawful practice of medicine, and in the dissemination of information to prevent the violation of such laws and to aid in the prosecution of those who violate such laws. The Texas State Board of Medical Examiners shall be authorized to employ and to compensate from such special fund employees and such other persons as may be found necessary to assist the local prosecuting officers of any county in the enforcement of all the laws of the State prohibiting the unlawful practice of medicine, and to carry out the other purposes for which said fund is hereby appropriated. Provided that all such prosecutions shall be subject to the direction and control of the regularly and duly constituted prosecuting officers, and nothing in this Act shall be construed as depriving them of any authority vested in them by law.

"In performing the duties devolved by this Act upon the Board of Medical Examiners, said Board shall act through the Secretary-Treasurer of the Board of Medical Examiners. The Secretary-Treasurer shall receive a salary to be fixed by the Legislature in its General Appropriation Bill for the performance of such duties under this Act, and shall make and file a surety bond in favor of the Texas State Board of Medical Examiners in the sum of not less than Ten Thousand Dollars ($10,000), conditioned that he will faithfully discharge the duties of his office. Such salary shall be paid out of said 'Medical Registration Fund' and shall not be, in any way, a charge upon the general revenue of the State. The Texas State Board of Medical Examiners shall employ and provide such clerks and employees as may be necessary to assist the Secretary-Treasurer in performing his duties and in carrying out the purposes of this Act; provided, that the compensation of all persons authorized to

be employed under this chapter, shall be paid only out of said 'Medical Registration Fund.' All disbursements from said fund shall be made only upon written approval of the President and Secretary-Treasurer of the State Board of Medical Examiners and upon warrants drawn by the Comptroller to be paid out of said fund.

"Section 4. The annual registration fee shall apply to all persons licensed by the Texas State Board of Medical Examiners, whether or not they are practicing within the borders of this State."

Sec. 2. That Article 4499, Revised Civil Statutes of Texas, 1925,[2] be amended, and is hereby amended to read as follows:

"Article 4499.

"It shall be the duty of every district clerk to keep as a permanent record of his office a book of suitable size, to be known as the 'Medical Register,' and shall record therein all licenses to practice medicine issued by the Texas State Board of Medical Examiners which shall be presented to him for registration and all matters and things required by the preceding Article to be recorded, and shall, as required by law, make therein notation of the cancellation of licenses so registered, and of the death or removal from the county of physicians whose licenses are so registered. When the Texas State Board of Medical Examiners or any district court shall revoke, suspend or cancel the license of any person to practice medicine, the said clerk shall, if said license is registered in his county, note the revocation, suspension or cancellation of such license upon the Medical Register of such county, and shall forthwith certify to the Texas State Board of Medical Examiners, through the Secretary of such Board, under the seal of the District Court which he serves, the fact that such license

[2] Vernon's AnnCiv.St. art. 4499.

is no longer registered, giving the exact date of such revocation, suspension or cancellation as received by him, and shall tax the fee for making such certificate against the Board as part of the costs of the cancellation proceedings. Each County Health Officer shall keep informed of the death or removal of all registered physicians residing in the county where he resides, and upon the death or removal of any such physician from said county, shall certify the fact of such death or removal, giving the name of the physician who has died or so removed, the date or approximate date of such death or removal, and shall date and sign such certificate and deliver the same, either in person or by registered mail, to the district clerk of such county, and such clerk shall make notation forthwith of such death or removal in said Medical Register, and notify the Secretary of the Texas State Board of Medical Examiners of such death or removal. The notation of such revocation, suspension or cancellation shall consist of writing in large, legible letters across the face of the record of such license revoked, suspended, or cancelled, the words "Cancelled this .....day of....., A.D., ...by the Texas State Board of Medical Examiners, or by..... District Court of ..... County;" filling in the blanks correctly so as to indicate the date of such cancellation, and such notation shall be dated and signed officially by the clerk. The notation of the death or removal of a registered physician by the district clerk shall be by noting the fact of such death or removal upon the record of the license of the physician who has died or removed from the county, in large legible letters, the date of such notation, and the official signature of the clerk. The district clerk shall collect from each physician who presents a license for registration the sum of One Dollar ($1) at the time such license is presented to him for registration, and that sum shall be full compensation for recording said license and making all notations in the Medical Register required by law to be so made in reference to the physician named in said license. All matters pertaining to each physician shall be kept and written upon one

page of said Medical Register, and no other entry or registration shall ever be made on said page. It shall be unlawful for any district clerk to make a certified copy of any page or entry in said medical register, or any part thereof, which is not an exact copy of the entire page, or which does not include all notations regarding the revocation, suspension or cancellation of license, death or removal of the physician in question, appearing in the office of said clerk. A copy from the Medical Register pertaining to any person whose license is registered therein, certified to by the district clerk having the custody of the said Medical Register, under the seal of the Court which he serves, shall be competent evidence in all trial courts and in hearings before the Texas State Board of Medical Examiners. The certificate of a district clerk under the seal of his office certifying that the person named in said certificate is not registered as a physician in the office of the district clerk shall also be prima facie evidence in all trial courts and in hearings conducted by the Texas State Board of Medical Examiners."

Sec. 3. That Title 71 of the Revised Civil Statutes of Texas, 1925,[3] be amended, and is hereby amended by adding a new Article, to be numbered and designated Article 4499a, to read as follows:

"Article 4499a.

"If any license issued under this Act shall be lost or destroyed, the holder of any such license may present his application for duplicate license to the Texas State Board of Medical Examiners, on a form to be prescribed by the Board, together with his affidavit of such loss or destruction, and that he is the same person to whom such license was issued, and other information concerning its loss or destruction as the Texas State Board of Medical Examiners shall require, and shall, upon payment of a fee

[3] Vernon's Ann.Civ.St. art. 4499a.

of Ten Dollars ($10) be granted a duplicate license; provided further that the same fee as set forth above for duplicate licenses shall also apply to endorsements by the Board."

Sec. 4. That Article 4500, Revised Civil Statutes of Texas, 1925,[4] be amended, and is hereby amended to read as follows:

"Article 4500.

"The Texas State Board of Medical Examiners may, in its discretion, upon payment by an applicant of a fee of One Hundred Dollars ($100) grant a license to practice medicine to any reputable physician who is a citizen of the United States or has filed his declaration of intention to become a citizen, and who is a graduate of a reputable medical college, or who has qualified on examination for a certificate of medical qualification for a commission in the United States Army or Navy, and to licentiates of other State or Territories having requirements for medical registration and practice equal to those established by the laws of this State. Applications for license under the provisions of this Act shall be in writing, and upon a form prescribed by the Texas State Board of Medical Examiners. Said application shall be accompanied by a diploma or photograph thereof, awarded to the applicant by a reputable medical college, and in the case of an Army Officer or Naval Officer, a certified transcript, or a certificate, or license, or commission issued to the applicant by the Medical Corps of the United States Army or Navy, or by a license, or a certified copy of license to practice medicine, lawfully issued to the applicant, upon examination, by some other State or Territory of the United States; provided that the licensing board of such other State or Territory in its examination requires the same general degree of fitness required by this State and grants the same reciprocal privi-

[4] Vernon's Ann.Civ.St. art. 4500.

leges to persons licensed by the Texas State Board of Medical Examiners of this State. Said application shall also be accompanied by an affidavit made by an executive officer of the United States Army or Navy, the President or Secretary of the Board of Medical Examiners which issued the license, or by a duly constituted registration officer of the State or Territory by which the certificate or license was granted, and on which the application for medical registration in Texas is based, reciting that the accompanying certificate or license has not been cancelled, suspended or revoked, except by honorable discharge from the Medical Corps of the United States Army or Navy, and that the statement of the qualifications made in the application for medical license in Texas is true and correct. Applicants for license under the provisions of this Act shall subscribe to an oath in writing before an officer authorized by law to administer oaths, which shall be a part of such application, stating that the license, certificate, or authority under which the applicant practiced medicine in the State or Territory from which the applicant removed, was at the time of such removal in full force and not cancelled or suspended or revoked. Said application shall also state that the applicant is the identical person to whom the said certificate, license, or commission, and the said medical diploma were issued, and that no proceeding has been instituted against the applicant for the cancellation, suspension or revocation of such certificate, license, or authority to practice medicine in the State or Territory in which the same was issued; and that no prosecution is pending against the applicant in any State or Federal Court for any offense which under the laws of the State of Texas is a felony. A reputable physician under the meaning of this Act shall be one who would be eligible for examination by the Texas State Board of Medical Examiners. A reputable medical college within the meaning of this Act shall be such as is defined in Article 4501 of the Revised Civil Statutes of Texas of 1925, as amended. It is provided, however, that the Board may, in its discretion, grant a license to any

reputable physician of another State or Territory, who graduated prior to 1907 from a medical college which at the time of his graduation required only three (3) courses of instruction of not less than six (6) months each for attainment of its diploma, or the Degree of Doctor of Medicine, and which, at the time of his graduation, was generally recognized by the medical examining boards of the States or Territories as maintaining entrance requirements and courses of instruction equal to those maintained by the then better class of medical schools of the United States; provided that the provisions of all other laws of this State are complied with, including a certificate from the State Board of Examiners in the Basic Sciences."

Sec. 5. That Article 4501, Revised Civil Statutes of Texas, 1925,[5] as amended, be amended, and is hereby amended to read as follows:

"Article 4501.

"All applicants for license to practice medicine in this State not otherwise licensed under the provisions of law must successfully pass an examination by the Texas State Board of Medical Examiners. The Texas State Board of Medical Examiners is authorized to adopt and enforce rules of procedure not inconsistent with the statutory requirements. An applicant, to be eligible for examination, must be a citizen of the United States, or has filed his declaration of intention to become a citizen, and must present satisfactory proof to the Board that he is at least twenty-one (21) years of age, of good moral character, who has completed sixty (60) semester hours of college courses other than in medical school, which courses would be acceptable, at the time of completing same, to the University of Texas for credit on a Bachelor of Arts Degree or a Bachelor of Science Degree, and who is a graduate of a bona fide reputable medical school; a reputable medical

[5] Vernon's Ann.Civ.St. art. 4501.

school shall maintain a course of instruction of not less than four (4) terms of eight (8) months each; and shall give a course of instruction in the fundamental subjects named in Article 4503 of the Revised Civil Statutes of Texas of 1925; and shall have the necessary teaching force, and possess and utilize laboratories, equipment, and facilities for proper instruction in all of said subjects. Application for examination must be made in writing verified by affidavit, and filed with the Texas State Board of Medical Examiners on forms prescribed by the said Board, accompanied by a fee of Fifty Dollars ($50). All applicants shall be given due notice of the date and place of such examination; provided that the partial examinations provided for in Article 4503 of the Revised Civil Statutes of Texas shall not be disturbed by this Article. Provided further that all students regularly enrolled in medical schools whose graduates are now permitted to take the medical examination prescribed by law in this State shall upon completion of their medical college courses be permitted to take the examination prescribed herein. If any applicant, because of failure to pass the required examination, shall be refused a license, he or she, at such time as the Texas State Board of Medical Examiners may fix, shall be permitted to take a subsequent examination, upon such subjects required in the original examination as the Board may prescribe, upon the payment of such part of Fifty Dollars ($50) as the Board may determine to be reasonable. In the event satisfactory grades shall be made on the subjects prescribed and taken on such re-examination, the Board may grant the applicant a license to practice medicine. The Board shall determine the credit to be given examinees on the answers turned in on the subjects of complete and partial examination, and its decision thereon shall be final. Provided, however, the Secretary may issue a temporary license to practice medicine to an applicant only after he has filed his completed application, together with an additional fee of Ten Dollars ($10), with the Secretary of the Texas State Board of Medical Examiners, and that all of the other

requirements as required for a permanent license are complied with; such temporary license shall be valid only until the date of the next Board meeting, and at that date the temporary license automatically expires, and is of no further effect. If the applicant fails the examination, no further permit shall be issued until he has successfully passed the examination, or is eligible for and has been granted reciprocity."

Sec. 6. That Article 4502, Revised Civil Statutes of Texas, 1925,[6] be amended, and is hereby amended to read as follows:

"Article 4502.

"The fund realized from all fees payable under this Act shall first be applied to the payment of all necessary expenses of the Board, and the remainder is to be applied by order of the Board to compensate members of the Board, said compensation to each member of the Board to be Twenty Dollars ($20) per day for any number of days which any such member may be active on business of the Board, whether such business consists of regular meetings, committee work for the Board, grading papers, or any other function which is a legitimate and proper function held to be necessary by the Texas State Board of Medical Examiners; provided, however, that no member of said Board shall be paid a per diem in excess of fifty (50) days of any calendar year. Said daily compensation shall be exclusive of the necessary costs of travel of any Board member, or any other expenses necessary to the performance of his duty. Provided also, that the premium on any bond required by the Board of any officer or employee of the Board shall be paid out of said fund, as well as the necessary expenses of any employee incurred in the performance of his duties."

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[6] Vernon's Ann.Civ.St. art. 4502.

Sec. 7. That Article 4506, Revised Civil Statutes of Texas, 1925,[7] be amended, and is hereby amended to read as follows:

"Article 4506.

"The Texas State Board of Medical Examiners shall have the right to cancel, revoke, or suspend the license of any practitioner of medicine upon proof of the violation of the law in any respect with regard thereto, or for any cause for which the Board shall be authorized to refuse to admit persons to its examination, as provided in Article 4505 of the Revised Civil Statutes of Texas, 1925, as amended.

"Proceedings under this Article shall be begun by filing charges with the Texas State Board of Medical Examiners in writing and under oath. Said charges may be made by any person or persons. The President of the Texas State Board of Medical Examiners shall set a time and place for hearing, and shall cause a copy of the charges, together with a notice of the time and place fixed for hearing, to be served on the respondent or his counsel at least ten (10) days prior thereto. When personal service is impossible, or cannot be effected, the Board shall cause to be published once a week for two (2) successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than ten (10) days after the date of the last publication of the notice. At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses or evidence in his behalf, to cross-examine witnesses, and to have subpoenas issued by the Board. The Board shall thereupon determine the charges upon their merits. All charges, complaints, notices, orders, records

[7] Vernon's Ann.Civ.St. art. 4506.

and publications authorized or required by the terms of this Act shall be privileged.

"Any person whose license to practice medicine has been cancelled, revoked or suspended by the Board may, within twenty (20) days after the making and entering of such order, take an appeal to any of the district courts in the county of his residence, but the decision of the Board shall not be enjoined or stayed except on application to such district court after notice to the Board. The proceeding on appeal shall be a trial de novo, as such term is commonly used and intended in an appeal from the justice court to the county court, and which appeal shall be taken in any District Court of the county in which the person whose certificate of registration or license is involved, resides. Upon application, the Board may reissue a license to practice medicine to a person whose license has been cancelled or suspended, but such application, in the case of cancellation or revocation, shall not be made prior to one (1) year after the cancellation or revocation, and shall be made in such manner and form as the Board may require."

Sec. 8. That Article 4507 and Article 4508 of the Revised Civil Statutes of Texas[8] be and the same are hereby repealed.

Sec. 9. That Article 4509 of the Revised Civil Statutes of Texas, 1925,[9] be amended, and is hereby amended to read as follows:

"Article 4509.

"The Texas State Board of Medical Examiners shall have the power to appoint committees from its own membership, and to make such rules and regulations not inconsistent with this law as may be necessary for the performance of

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[8] Vernon's Ann.Civ.St. arts. 4507, 4508.
[9] Vernon's Ann.Civ.St. art. 4509.

its duties, the regulation of the practice of medicine, and the enforcement of this Act. The duties of any such committees appointed from the Texas State Board of Medical Examiners membership shall be to consider such matters pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith as shall be referred to such committees, and they shall make recommendations to the Texas State Board of Medical Examiners with respect thereto. The Texas State Board of Medical Examiners shall have the power, and may delegate the said power to any committee, to issue subpoenas, and subpoenas duces tecum to compel the attendance of witnesses, the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its jurisdiction. The Texas State Board of Medical Examiners shall not be bound by strict rules of evidence or procedure, in the conduct of its proceedings, but the determination shall be founded on sufficient legal evidence to sustain it. The Texas State Board of Medical Examiners shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law. The Texas State Board of Medical Examiners shall be represented by the Attorney General and/or the County or District Attorneys of this State. Before entering any order cancelling or suspending a license to practice medicine, the Board shall hold a hearing in accordance with the procedure set out in Article 4506, Revised Civil Statutes of Texas, 1925, as amended by this Act."

Sec. 10. That Article 4510 of the Revised Civil Statutes of Texas, 1925,[10] be amended, and is hereby amended to read as follows:

"Article 4510.

"Any person shall be regarded as practicing medicine within the meaning of this law:

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[10] Vernon's Ann.Civ.St. art. 4510.

"(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas, and Article 4504, Revised Civil Statutes of Texas as contained in this Act."

Sec. 11. That Article 741 of the Penal Code of Texas of 1925,[11] as amended, be amended, and is hereby amended to read as follows:

"Article 741.

"Any person shall be regarded as practicing medicine within the meaning of this Chapter:

"1. Who shall publicly profess to be a physician or surgeon and shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

"2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas and Article 4504, Revised Civil Statutes of Texas as contained in this Act."

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[11] Vernon's Ann.P.C. art. 741.

Sec. 12. That Article 743 of the Penal Code of Texas of 1925,[12] as amended, be amended, and is hereby amended to read as follows:

"Article 743.

"If any person required to register as a practitioner of medicine under the provisions of Article 4498a of the Revised Civil Statutes of Texas of 1925, as amended, shall fail, neglect, or refuse to apply for and pay such annual registration fee as provided for in Article 4498a of the Revised Civil Statutes of Texas, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Five Hundred Dollars ($500) and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense. Provided, however, that if any such practitioner licensed by the Texas State Board of Medical Examiners shall have had any prosecutions filed against him when such license stood suspended, revoked or cancelled, or if any penalties have been incurred by such practitioner during such period, any reinstatement of said practitioner shall in no way abate such prosecutions or penalties."

Sec. 13. All laws and parts of laws in conflict herewith are hereby repealed.

Sec. 14. That in the event any Section, or part of Section, or provision of this Act be held unconstitutional, invalid, or inoperative, this shall not affect the remaining Sections or parts of Sections of this Act, but the remainder of this Act shall be given effect as if the invalid, unconstitutional, or inoperative Section, or any part or Section of such Section or provision had not been included.

Sec. 15. The fact that the practice of medicine, proper medical care for the people of Texas, and a satisfactory

[12] Vernon's Ann.P.C. art. 743.

regulation of medical practice are vital to the health and welfare of the people of the State of Texas, and that the present law is not conducive to their best welfare, creates an emergency and an imperative public necessity that the Constitutional Rule requiring that a bill be read on three separate days in each House be dispensed with, and that immediately upon the passage of this Act it become of full force and effect.

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The following provisions of the Penal Code are applicable:

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Art. 739. Authority to practice to be registered

It shall be unlawful for any one to practice medicine, in any of its branches, upon human beings within the limits of this State who has not registered in the District Clerk's office of every County in which he may reside, and in each and every County in which he may maintain an office or may designate a place for meeting, advising with, treating in an manner, or prescribing for patients, the certificate evidencing his right to practice medicine, as issued to him by the Texas State Board of Medical Examiners, together with his age, post office address, place of birth, name of medical college from which he graduated, and date of graduation, subscribed and verified by oath, which, if wilfully false, shall subject the affiant to conviction and punishment for false swearing, as provided by law. The fact of such oath and record shall be endorsed by the District Clerk upon the certificate. The holder of every such certificate must have the same recorded upon each change of residence to another County, as well as in each and every County in which he may maintain an office, or in which he may designate a place for meeting, advising with, treating in any manner, or prescribing for patients; and the absence of such record in any place where such

record is hereby required shall be prima facie evidence of the want of possession of such certificate.

Art. 740. Exceptions

Nothing in this Chapter shall be so construed as to discriminate against any particular school or system of medical practice, nor to affect or limit in any way the application or use of the principles, tenets, or teachings of any church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided further, that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members. The provisions of this Chapter do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry; nor to duly licensed optometrists, who confine their practice strictly to optometry as defined by statute; nor to nurses, who practice nursing only; nor to duly licensed chiropodists, who confine their practice strictly to chiropody as defined by statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract surgeons of the United States Army, Navy, or Public Health and Marine Hospital Service, in the performance of their duties, and not engaged in private practice; nor to legally qualified physicians of other States called in consultation, but who have no office in Texas, and appoint no place in this State for seeing, examining, or treating patients. This law shall be so construed as to apply to persons other than registered pharmacists of this State not pretending to be physicians who offer for sale on the street or other public places contraceptives, prophylactics or remedies which they recommend for the cure of disease.

Art. 741

(See H.B. 254, supra).

Art. 742. Unlawfully practicing medicine; penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

Art. 742-a. The Healing Art Defined

The healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

Art. 742-b. Exceptions

The provisions of the Basic Science Law do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry, or those persons under the jurisdiction of the Texas State Board of Dental Examiners; nor to duly licensed optometrists, who confine their practice strictly to optometry, as defined by Statute; nor to nurses who practice nursing only; nor to duly licensed chiropodists, who confine their practice strictly to chiropody as defined by Statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract Surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties, and not engaged in private practice; nor to legally qualified physicians of other States called in consultation, but who have no office in Texas and appoint no place in this State for seeing, examining or treating patients. The Basic Science Law shall not affect or limit in any way the

application or uses of the principles, tenets, or teachings of any church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; provided however, that the provisions of this Act shall not apply to a member of any religious faith in administering the last rites of his faith; and provided further that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members, nor shall the Basic Science Law apply to persons licensed to practice the healing art, or any branch thereof in the State of Texas when this Act shall take full force and effect; nor shall the Basic Science Law apply to any Chiropractor who is a graduate of a school which was regularly organized and conducted as a chiropractic school in the United States at the time of such graduation and who has practiced Chiropractic one (1) year immediately preceding the effective date of this Act and who has resided in Texas for two (2) years immediately preceding the effective date of this Act and who has never had a license to practice any branch of the healing art cancelled by any American or Canadian State, Province, or Territory, provided however, that licenses voided by virtue of the decision in Ex Parte: Halsted, 182 S.W.(2nd) 479, shall not be construed as licenses cancelled as provided by this Section.

Art. 742-c. Unlawfully Practicing Healing Art; Penalty

Any person who practices the healing art, or any branch thereof, without having obtained a valid certificate from the State Board of Examiners in the Basic Sciences, except as otherwise authorized by this Act, shall be fined not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), or by imprisonment in the county jail for not more than thirty (30) days, or by both such

fine and imprisonment. Each day of such violation shall constitute a separate offense.

Art. 743.
(See H.B. 254, supra).

Art. 744. False statement by applicant

Whoever shall make any false statement in his application for examination by the Board of Medical Examiners, or who shall make any false statement under oath to otbain a license or to secure the registration of his license to practice medicine, shall be guilty of false swearing and punished accordingly.

Art. 744-a. Obtaining Basic Science Certificate by Fraud, Forgery or Counterfeit; Penalty

Any person who obtains a basic science certificate by fraudulent means, or who forges, counterfeits or fraudulently alters any such certificate, shall be punished by confinement in the penitentiary not less than two (2) nor more than five (5) years.

Art. 744-b. Valid Basic Science Certificate Prerequisite to License to Practice Healing Art

Any person who knowingly obtains for himself a license to practice the healing art, or any branch thereof, or who aids, advises or assists another in so doing without first obtaining a certificate of proficiency from the Basic Science Board, or any person who shall present to a licensing board authorizing to grant licenses to practice the healing art, or any branch thereof, a certificate obtained from the State Board of Examiners in the Basic Sciences by dishonesty or fraud or by any forged or counterfeit certificate of proficiency, or who knowingly aids, advises or assists another in so doing, shall be guilty of a felony and upon conviction shall be punished by fine of not less

than One Hundred Dollars ($100) nor more than Two Thousand Dollars ($2,000), or imprisonment in the penitentiary for not less than two (2) nor more than five (5) years, or by both such fine and imprisonment.

Art. 745. Medical register

Every district clerk shall keep as a permanent record of his office a book to be known as the "Medical Register", and shall record therein all licenses to practice medicine issued by the State Board of Medical Examiners which shall be presented to him for registration. When the license of any one to practice medicine has been cancelled, said clerk shall, if such license is registered in his county, note such cancellation upon said book, and shall also note therein the death or removal of any licensee. Any such clerk knowingly violating any provision hereof shall be fined not exceeding fifty dollars.

APPENDIX III

Article 4590c, Vernon's Annotated Civil Statutes.

Texas Basic Science Law.

Section 1. Basic Science Certificate Required.

No person shall be permitted to take an examination for a license to practice the healing art or any branch thereof, or be granted any such license, unless he has presented to the Board or officer empowered to issue such a license as the applicant seeks, a certificate of proficiency in anatomy, physiology, chemistry, bacteriology, pathology, and hygiene and public health, hereinafter referred to as the basic sciences, issued by the State Board of Examiners in the Basic Sciences.

Sec. 2. The Healing Art Defined.

For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

Sec. 3. Board of Examiners.

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Sec. 4. Organization, Officers and Compensation of Board.

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Sec. 5. Fees Payable by Applicants.

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Sec. 6. Examination.

The Board shall conduct examinations at such times and places as it deems best, provided, however, that the first examination shall be held within six (6) months from the effective date of this Act, and one examination shall be held during each period of six (6) months thereafter. Every applicant, except as hereinafter provided, shall be examined to determine his knowledge, ability and skill in the basic sciences. The examinations shall be conducted in writing, and in such manner as to be entirely fair and impartial to all individuals and to every school or system of practice. All applicants shall be known to the examiners only by numbers, without names, or other method of identification on examination papers by which members of the Board may be able to identify such applicants or examinees, until after the general averages of the examinees' numbers in the class have been determined, and license granted or refused. If the applicant receives a credit of seventy-five per cent (75%) or more in each of the basic sciences, he shall be considered as having passed the examination. If the applicant receives less than seventy-five per cent (75%) in one subject and receives seventy-five per cent (75%) or more in each of the remaining subjects, he shall be allowed a re-examination at the examination next ensuing, on application and the payment of the prescribed fee, and he shall be required to be re-examined only in the subject in which he received a rating less than seventy-five per cent (75%). If the applicant receives less than seventy-five per cent (75%) in more than one subject, he shall be entitled to take a second examination after a period of six (6) months has elapsed from the date of the first examination, and he shall then be re-examined in all subjects. If the applicant receives less than seventy-five per cent (75%) in more than one subject on such second examination, he shall not be re-examined unless he presents proof, satisfactory to the Board, of additional study in the basic sciences sufficient

to justify re-examination, and shall then be re-examined in all subjects. Provided, however, it is the intent of this Act that the examinations given shall be similar to the examinations given in the subjects named in this Act at the colleges or universities named above.

Sec. 7. Requirements for certificate; temporary license.

No certificate shall be issued by the Board unless the person applying for it submits evidence, satisfactory to the Board, (1) that he is a citizen of the United States; (2) that he is not less than nineteen (19) years of age; (3) that he is a person of good moral character; (4) that he was graduated by a high school accredited by the State Committee on Classified and Accredited Schools, or a school of equal grade, or that he possesses educational qualifications equivalent to those required for graduation by such an accredited high school; (5) he must have completed sixty (60) semester hours of college courses which would be acceptable at the time of completing same at The University of Texas on a Bachelor of Arts Degree or a Bachelor of Science Degree; and (6) that he has a comprehensive knowledge of the basic sciences as shown by his passing the examination given by the Board as by this Act required. This shall not be construed to prevent the issue of certificates under the provisions of Section 8 of this Act. Provided, however, the Secretary may issue a temporary license to practice medicine to an applicant only after he has filed his completed application with the Secretary, and that all of the other requirements as required for a permanent license are complied with, such temporary license shall be valid only until the date of the next Board Meeting, and at that date, the temporary license automatically expires and is of no further effect. If the applicant fails the examination, no further temporary license shall be issued until he has successfully passed the examination, or is eligible for and has been granted reciprocity.

Sec. 8. Reciprocity

The Board shall waive the examination required by Section 7, when proof satisfactory to the Board is submitted, showing (1) that the applicant has passed in another State or Territory or the District of Columbia an examination in the basic sciences before a Board of Examiners in the Basic Sciences; (2) that the requirements of that State or Territory or the District of Columbia are not less than those required by this Act as a condition precedent to the issue of a certificate; (3) that the Board of Examiners in the Basic Sciences in that State or Territory or the District of Columbia grants like exemption from examination in the basic sciences to persons holding certificates from the State Board of Examiners in the Basic Sciences in Texas; (4) that the applicant show satisfactory proof that he is a citizen of the United States; and (5) that the applicant is a person of good moral character and the holder of an uncancelled basic science certificate from another State or Territory or the District of Columbia.

Sec. 9. Appeal.

Any person aggrieved by any action of the Board may appeal to a district court of any county in which the aggrieved person resides. Such appeals shall be taken by serving the Secretary of the Board with citation duly issued by the clerk of the district court, and the same shall be served in the manner provided by law in the service of citations in suits of a civil nature, and at the expiration of twenty (20) days after the service of said citation, the said cause shall thereupon stand for trial. Such notice of appeal, or citation shall state the action from which the appeal is taken, and, if the appeal is from an order of the Board, stating such order or the part thereof from which the appeal is taken, and filing with the district clerk a bond in the sum of Five Hundred Dollars ($500), conditioned for the payment of all costs of the appeal.

All members of the Board who shall incur any expense on account of the trial of any proceeding in district court incident to appeal from actions of the Board, shall receive the necessary and proper expenses, including traveling expenses incident thereto, same to be paid out of the funds of the Board in the same manner and by the same proceeding as other expenditures are authorized from said fund.

Sec. 10. Certificates and Licenses Void.

Any basic science certificate or any license to practice the healing art, or any branch thereof, issued contrary to this Act, shall be void. Any license or certificate of authority to practice the healing arts, or any branch thereof, based upon a void basic science certificate shall be void and shall be so adjudged by any District Court in which the trial of a suit to adjudge the same void or cancel or revoke a license to practice the healing arts may be had. The procedure for such revocation or cancellation shall be in accordance with the provisions of the Act under which such license was issued authorizing the cancellation or revocation of licenses for the practice of the healing art generally. Any certificate of proficiency issued by the Board shall become void upon the revocation of the license of the holder thereof to practice the healing art, or any branch thereof.

Sec. 11. Practice without Certificate Forbidden.

Any person who practices the healing art, or any branch thereof, without having obtained a valid certificate from the State Board of Examiners in the Basic Sciences, except as otherwise authorized by this Act, shall be fined not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), or by imprisonment in the county jail for not more than thirty (30) days, or by both such fine and imprisonment. Each day of such violation shall constitute a separate offense.

Sec. 12. Fraudulent Certificate Forbidden.

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Sec. 13. Bribery Forbidden.

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Sec. 14. Fraudulent Licenses Forbidden.

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Sec. 15. Enforcement.

It shall be the duty of every District Judge in this State, who is required by law to impanel grand juries, to explain to each grand jury the provisions of this Act, and to direct the said grand jury to inquire as to whether or not any provisions of this Act have been violated, and if sufficient evidence has been discovered, to return true bills of indictment.

In the enforcement of this law, the Board shall be represented by the Attorney General and by the County and District Attorneys of this State. The Board, any committee or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The Board shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding or remedy authorized by law.

Sec. 16. Exceptions.

The provisions of this Act do not apply to dentists, duly qualified and registered under the laws of this State,

who confine their practice strictly to denistry, or those persons under the jurisdiction of the Texas State Board of Dental Examiners; nor to duly licensed optometrists who confine their practice strictly to optometry as defined by Statute; nor to nurses who practice nursing only; nor to duly licensed chiropodists, who confine their practice strictly to chiropody as defined by Statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract Surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties, and not engaged in private practice; nor legally qualified physicians of other States called in consultation, but who have no office in Texas, and appoint no place in this State for seeing, examining or treating patients. The Basic Science Law shall not affect or limit in any way the application or use of the principles, tenets or teachings of any church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with, provided however, that the provisions of this Act shall not apply to a member of any religious faith in administering the last rites of his faith and provided further that all those so ministering or offering to minister to the sick or suffering by prayer shall refrain from maintaining office, except for the purpose of exercising the principles, tenets or teachings of the church of which they are bona fide members; nor shall the Basic Science Law apply to persons licensed to practice the healing art, or any branch thereof, in the State of Texas when this Act shall take full force and effect; nor shall the Basic Science Law apply to any Chiropractor who is a graduate of a school which was regularly organized and conducted as a chiropractic school in the United States at the time of such graduation and who has practiced Chiropractic one (1) year immediately preceding the effective date of this Act and who has resided in Texas for two (2) years immediately preceding the effective date of this Act and who has never had a license to practice any branch of

the healing art cancelled by any American or Canadian State, Province or Territory, provided, however, that licenses voided by virtue of the decision in Ex Parte Halsted, 182 S.W.2nd 479, shall not be construed as licenses cancelled as provided by this Section. As amended Acts 1949, 51st Leg., p. 522, ch. 287, § 1.

Sec. 16-a. Certificates issued to persons having college or university credits.

The Board shall issue a certificate of proficiency to any person who is otherwise qualified by law and who shall present to the Board, a transcript of credits certifying that such person has satisfactorily completed sixty (60) or more semester hours of college credits at a college or university which issues credits acceptable by The University of Texas leading toward a Bachelor of Arts or a Bachelor of Science Degree; said college or university credits shall include the satisfactory completion of all of the subjects enumerated in Section 1 of this Act with an average of seventy-five per cent (75%) or better in each of such courses; and The University of Texas shall offer at the Main University, at Austin, Texas, beginning with the fall semester 1949, courses in each of the above-enumerated subjects.

Sec. 23a. Graduates enrolled before act became law.

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Sec. 24. Saving Clause.

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Sec. 25. Present Licensure Acts Not Repealed.

No provisions of this Act shall be construed as repealing any statutory provision in force at the time of its passage with reference to the requirements governing the issuance of licenses to practice the healing art or any branch thereof, or as in any way lessening such requirements. Acts 1949, 51st Leg., p. 170, ch. 95.

NOV 2 1961

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 443

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHARLES D. STUART, *et al.*,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES L. MCNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
Counsel for Respondents.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 443

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHARLES D. STUART, *et al.*,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court of the United States and the Honorable Chief Justice and Associate Justice of Said Court:

Comes now the Respondents in the above entitled and numbered case and respectfully present herewith their Brief in Opposition to the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which Petition was filed herein on the 25th day of September, A. D. 1961.

REPLY TO PETITION

The Respondents will reply to the Petition of the Petitioners by countering the assertions made by the Petitioners.

With reference to the proposition of the Petitioners under *The Question Presented*, Respondents would reply that there are numerous substantial Federal questions in this suit which attacks the constitutionality of Articles 4499-4512, Vernon's Texas Civil Statute, which Articles are referred to as "The Texas Medical Practice Act", and which Articles are set forth in toto in Appendix II of the Petitioners' Petition. As found by the Honorable Court of Appeals a substantial Federal question has been raised in this case which warrants a trial before a Three-Judge District Court. Basically the Respondents-Naturopaths assert that they should not be compelled to obtain an Allopathic "M.D." license as provided for by the Texas Medical Practice Act before they can practice their limited recognized specialty field of the healing art known as Naturopathy, because such requirements in said act whereby the Respondents-Naturopaths, as practitioners of the limited recognized specialty field of Naturopathy, are required to take and pass the examination given for the general Allopathic medical physician and surgeon and obtain an "M.D." license before Respondents can practice as Naturopathic physicians, are unconstitutional and invalid as to the Respondents-Naturopaths within the purview of the *Preamble, Section 2 of Articles IV, and Article VI of the Constitution of the United States of America*, and *Section 1*

of the XIV Amendment thereto, the anti-trust laws and laws against monopolies and combinations in restraint of trade *(Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26 and 44)* because such requirements are:

1. That an examinatiton must be taken on many subjects not practiced by the Naturopath and in some instances on subjects abhorred by and contrary to the tenets, principles and teachings of the Natutropathic School of Medicine; and in particular, the Naturopath excludes from his practice the following: major surgery, x-ray and radium for therapeutic purposes, and the use of toxic drugs, while the Allopath examination covers these major factors used in the Allopathic system of treatment;

2. That the examination which must be taken and passed is to be given by a board of medical examiners which follows the Allopathic School of Medicine and is not prepared, equipped, nor learned in the Naturopathic School of Medicine, and which board is not authorized to issue a license to practice Naturopathy;

3. An arbitrary interference with the private occupation of Naturopathy under the guise of protecting public interest;

4. An imposition of unusual and unnecessary restrictions upon the lawful occupation of Naturopathy;

5. An arbitrary, unreasonable abridgement of Respondents-Naturopaths citizenship rights and privileges and an invasion of their liberty to engage in the

lawful occupation of Naturopathy in that said requirements are unreasonable, onerous burdens impossible to perform, not fairly applicable and prohibitive because such requirements do not pertain to the limited specialty of the healing art known as Naturopathy;

6. Such that have no reasonable relation to the limited specialty of the healing art known as Naturopathy;

7. Such that have no real or substantial relation to the qualifications required for the practice of the limited specialty of the healing art known as Naturopathy;

8. So unreasonable and extravagant as to interfere with the property and personal rights of Naturopaths, unnecessarily and arbitrarily;

9. An arbitrary and unreasonable attempt to exercise the authority vested in the legislature in the public interest to establish rules and regulations for the practice of the limited specialty of the healing arts known as Naturopathy;

10. Such that have no rational relation to the objective of establishing rules and regulations for the practice of the limited specialty of the healing art known as Naturopathy; and

11. Are creative of a monopoly and formative of a restraint of trade in that such requirements provide for and foster only the Allopathic School of Medicine.

In addition to the foregoing substantial federal questions involved in this law suit, the Respondents submit that a myriad of intermingling questions are presented by the pleadings in this case, as follows:

1. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by the Federal District Court?

2. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by a Three-Judge District Court?

3. Are facts alleged which entitle the Respondents to relief in this civil action?

4. Does the Federal District Court and or Three-Judge District Court have jurisdiction of this case, because the fundamental rights of the Respondents guaranteed by the Constitution of the United States of America have been violated and are threatened to be violated because the *Texas Medical Practice Act (Articles 4495-4512, Texas Revised Civil Statutes 1925, as amended to date)*, supra, as interpreted and enforced by the Texas Courts and the Petitioners herein, and the acts and conduct of the Petitioners in prosecuting and threatening to prosecute suits against Respondents under color of such Act to enjoin Respondents from practicing their profession of the specialty of Naturopathy under the guise of prohibiting them from practicing the unlimited and all-inclusive practice of medicine or allopathy abridge the Respondents'

privileges and immunities, deprive them of property without due process of law, and deny them the equal protection of the laws, in violation of *Article 4, Section 2*, and *Article 6 of the Constitution of the United States*, and *Section 1 of the 14th Amendment* thereto, and where the injunction sought for by Respondents is provided for under the Civil Rights Acts, *Title 42, U. S. C. A., Sections 1983-1985*?

5. Is Naturopathy a recognized limited healing art whereby the practitioner thereof diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods and who utilizes dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity, and who provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension, abnormalities of tissues, organs, muscles, joints, bones and skin, pressure on nerves, blood vessels, and lmyphatics, and who assists patients in making adjustments of a mental and emotional nature and which limited healing art excludes the use of major surgery, x-ray, and radium for therapeutic purposes, and the use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life, as contradistinguish-

able from the Allopathic (all-inclusive) practice of medicine such as defined in the said Texas Medical Practice Act?

6. Is *Article 16, Section 31 of the Constitution of the State of Texas*, which provides, "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but no preference shall ever be given by law to any schools of medicine" unconstitutional as being repugnant to the Constitution of the United States and Amendments thereto, because the Texas Courts have construed such Texas Constitutional provision as meaning that the Legislature of the State of Texas can require Naturopath physicians to take the same examination as the Allopathic physicians and surgeons to obtain a certificate to practice their profession, when the Allopathic school of medicine is entirely separate and distinct from the Naturopathic school of medicine and when the Naturopathic school of medicine is a limited and special branch of the healing art and when many of the Allopathic practices are repugnant to and abhorred by the Naturopathic school of medicine and when the Texas Courts have further construed said provision of the Texas Constitution to mean that the Naturopath has to be examined on synthetic toxic drugs, major surgery, and the use of x-ray and radium equipment for therapeutic purposes when such practice and subjects are not included within nor embraced by the Naturopathic

school of medicine, and when the interpretation of said provision of the Texas Constitution is meant to mean that the Naturopaths cannot practice their profession whose theories, philsophies and practices have been developed to a high degree of therapeutic efficiency by the Naturopaths persistently maintaining the efficiency of their own philosophy, because to practice Naturopathy in Texas according to said Constitutional provision, the Texas Courts have held that the Naturopathy cannot be examined in his own philosophy and theories of its school of medicine but must turn their backs on their own theories, philosophies, and school of medicine and study and be examined on the theories, philosophies, and school of medicine of the Allopathic physicians and surgeons and where such requirement is arbitrary, discriminatory, and therefore unconstitutional in its operative effect because it violates *Section 1 of the 14th Amendment to the Constitution of the United States of America* which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law"?

7. Is the Naturopathic profession, whose fundamental concept is largely nutritional, i.e. to build, balance, and normalize the human body and whose practitioners place considerable emphasis upon the science of

nutrition and the use of natural foods in their natural states and which profession is not of itself inimical to the health and welfare of the people and whose practitioners are not nuisances per se a lawful profession; and is the right to allow and practice such profession a property right and one of the fundamental rights of citizenship; and is such right to follow and practice the Naturopathic profession, business or occupation, a right protected by the Constitution of the United States within the meaning and intent of the provisions of *Section 1 of the 14th Amendment of the Constitution of the United States of America* which says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," and is such right included within the constitutitonal guaranty set forth in its preamble to the right of liberty and the pursuit of happiness?

8. Is the Texas State Board of Medical Examiners authorized to issue licenses to the Appellants of the limited field of Naturopathy?

9. Is Naturopathy a nuisance per se?

10. Is the practice of Naturopathy inimical to the health and welfare of the people?

11. Can the Petitioners force the Respondents to qualify as a general physician and surgeon in order to

practice the more limited system of healing known as Naturopathy?

12. Is Naturopathy a recognized lawful field of the healing arts?

13. Do the Petitioners have the authority to prohibit the practice of the limited system of healing known as Naturopathy?

14. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, unconstitutional because it violates *Section 2 of Article 4 of the Constitution of the United States of America* which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"?

15. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Respondents herein, unconstitutional because it violates *Article 6 of the Constitution of the United States of America* which provides that, "This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land; and the Judges in every State shall be bound thereby; anything in the Constitution and laws of any State to the contrary notwithstanding"?

16. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, arbitrary and discriminatory and unconstitutional in its operative effect when applied to

the Respondents who are Naturopathic physicians, and is said Texas Medical Practice Act unconstitutional because it violates *Section 1 of the 14th Amendment to the Constitution of the United States* which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law"?

17. Is the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, void and unenforceable as class legislation because it violates the "Civil Rights Act" of the United States *(Title 42, U. S. C. A., Section 1983)* in any of the following respects:

a. By arbitrarily requiring Naturopaths to pass examinations in non-naturopathic subjects in order to qualify to practice Naturopathy?

b. By prohibiting the practice of Naturopathy without showing it to be detrimental to the public or inherently harmful?

c. By unfairly discriminating against Naturopaths in the conferring of exclusive jurisdiction and control over these non-allopathic medical practitioners on their allopathic medical competitors?

d. By creating a monopoly by giving allopaths ascedency and control over the limited school of Naturopathy and the power to prevent naturopathic physicians from practicing in violation of the federal statutes pertaining to Monopolies and Re-

straint of Trade *(Title 15, U.S.C.A. Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26 and 44)?*

e. By usurping the power of the State to pass on the qualifications of, issue license to, and control of naturopathic physicians?

f. By restricting the rights of the citizens who have faith in and desire treatments by methods not based on the philosophy of that organization (allopathic school) practicing under the Texas Medical Practice Act?

g. By usurping power to suspend a law in violation of *Article 1, Section 28 of the Constitution of the State of Texas?*

18. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, constitute an invalid exercise of the police power in that it bans or prohibits the practice of Naturopathy, a successful recognized harmless system of healing, under the guise of regulating or controlling it?

19. Does the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, arbitrarily interfere with the rights of the Respondents herein by imposing unnecessary restrictions upon their pursuing a lawful trade and occupation, to-wit: the practice of Naturopathy?

20. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Respondents herein, violate and repudiate the "due process" and "equal protection" guarantees of the Law of the Land?

21. Is that part of *Section 31 of the Constitution of the State of Texas, 1876*, which provides as follows:

> "But no preference shall ever be given by law to any school of medicine."

as interpreted and enforced by the Courts of the State of Texas and the Petitioners herein, void as being contrary to the Constitution of the United States and the Federal Civil Rights Statutes, because among other things the Supreme Court of Texas has held that the aforesaid portion of the Texas Constitution is construed to mean that a Naturopath, who follows a limited and separate school of medicine from the allopathic, allopathic-homeopathic, allopathic-eclectic, and allopathic-osteopathic schools of medicine, must obtain a license from the Texas State Board of Medical Examiners, which Board is composed of followers of allopathic, allopathic-homeopathic, allopathic-eclectic, allopathic-osteopathic schools of medicine, and because such Board examines only in the aforesaid schools of medicine and such Board is not prepared, equipped nor learned in the naturopathic school of medicine, and which Board is not authorized to issue a license to practice Naturopathy?

22. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and Petitioners herein, void as being repugnant to *Section 1 of the 14th Amendment to the Constitution of the United States of America*, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?

23. Does the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and the Petitioners herein, under the guise of protecting public interests and an alleged exercise of police power, illegally and arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations in violation of said *Section 1 of the 14th Amendment to the Constitution of the United States of America?*

24. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of the State of Texas and the Petitioners herein, unconstitutional in view of said *Section 1 of the 14th Amendment to the Constitution of the United States of America* because said portion of the Texas Constitution is an arbitrary, unreasonable abridgement of Respondents'-citizens' rights and privileges and an invasion of their liberty to engage in lawful business, because of unreasonable requirements, onerous burdens impossible to perform, not fairly applicable, and prohibitive?

25. Is the *Texas Naturopathic Law (Article 4590d)* valid?

26. Assuming that the aforementioned Texas Medical Practice Act and *Section 31 of Article XVI of the Constitution of the State of Texas* are violations of the Constitution and laws of the United States, does such Texas Medical Practice Act and Texas Constitutional provision restrict the Respondents from practicing Na-

turopathy, a lawful occupation, and are the acts and conduct of the Petitioners acting under the color of said Texas Medical Practice Act and the aforesaid portion of the Constitution of the State of Texas in filing suits, prosecuting and threatening to file suits against Respondents to prevent Respondents from following their lawful profession, a violation of the Respondents' Civil Rights as guaranteed to them by the Federal Statutes, and particularly *Title 42, Section 1983, U.S.C.A.* which provides for civil action for deprivation of rights, and which says that, "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"?

27. Are the Respondents entitled to a Temporary and Permanent Injunction against the Petitioners because of the Petitioners' illegal actions in obtaining and intending to obtain injunctions, fines and forfeitures against and imprisonment of Respondents herein, and because the Respondents are now and are threatened to continue to be greatly harmed, damaged, imprisoned and injured by the said illegal, wrongful, knowing and purposeful acts of the Petitioners and because Respondents have no plain, adequate or efficient remedy at law to redress

the said wrongful, knowing and purposeful acts of the Petitioners other than by injunction, and because any other remedies to which they could be remitted would be attended by uncertainties, would involve a multiplicity of suits and would cause the Respondents irreparable harm and injury and occasion undue hardship, vexation and delay, and because such temporary and permanent injunction should be issued because the Respondents will suffer immediate and irreparable injury, harm, damage, imprisonment, forfeitures, and fines?

28. Is medical freedom guaranteed by the Constitutions of the United States of America and the State of Texas and their respective Amendments?

Incidentally in connection with the preceding questions Nos. 9 and 10, permit the Respondents to quote from one of the recognized medical doctors to his opinion concerning the value of the age-old school of Naturopathy. Witness the words of Dr. Ray Lyman Wilbur, M.D., as Chairman of the Council on Medical Education and Hospitals before the Fortieth Annual Congress on Medical Education and Licensure, held in Chicago on February 14, 1944, "New treatments make use of heat, cold, water, electricity, and special manipulations. * * * They bring biological responses more potent than many of the drugs gathered through centuries by trial and error .* * * Medicine based on pills and potions is becoming obsolete. * * * The physiology, with the help of physics, has taught us many ways to deal with the human body that were dreamed of only a decade ago by us, but comparatively

successfully pursued by those of the irregular schools. * * * The medical profession will profit by recognizing this new concept, and must insist that its schools promptly mold their instruction to conform with the new knowledge of body mechanics. * * *." *The Journal of The American Medical Association, March 25, 1944, Vol. 124, pp. 815 and 816.*

The Petitioners propose in *The Question Presented* that the Respondents desire to practice Naturopathy without any regulation of the State of Texas. Nothing could be farther from the truth. The Respondents take the position that Naturopathy can and should be regulated by reasonable regulations. As a matter of fact the State of Texas now has what is known as "The Texas Naturopathy Law" which is *Article 4590d of the Revised Civil Statutes of Texas, 1925, as amended to date;* and such law has been declared unconstiutional by the Texas Courts; but these Respondents would like for such Texas Naturopathy Law to be revised and life breathed into the Texas Naturopathic Law by the holding of the Federal Courts that the Naturopaths do not have to submit to the provisions of the Texas Medical Practice Act before they can practice their lawful profession. The Respondents state that there should be a reasonable regulation of any and all professions and that such regulations is proper; but at the same time the Respondents contend that any such regulation should not be unreasonable or arbitrary to the extent that the necessary compliance therewith would be so ridiculous, unwarranted, unreasonable, onerous, burdensome and non applicable to the profession and so contrary to their principles and tenants and teachings that compliance there-

with is prohibitive and confiscatory and is tantamount to the deprivation to the Respondents of their right to practice their lawful profession. The Respondents state that the aforesaid regulatory Statute known as The Texas Naturopathy Law actually provides for a greater number of hours of college preparation than the regular physician and surgeon (M.D.) or allopathic Act (Texas Medical Practice Act, supra) and these Respondents welcome such regulations.

These Respondents allege that they are Naturopathic Physicians, and as such it can be presumed that they have complied with all requirements to practice Naturopathy, which in the State of Texas is the obtaining of a license under the Basic Science Act and a license through the Texas Naturopathy Board. This suit does not in any way attack the Basic Science Law or the Texas Naturopathic Act; but this suit is leveled at The Texas Medical Practice Act, and the Attorney General of the State of Texas, the Texas Medical Board and the District Attorney of Dallas County, Texas, because of the construction placed on such Act by the highest Court of Texas, and because the Petitioners are taking the position that these Respondents have to comply with the Texas Medical Practice Act and obtain a physicians and surgeons or "M.D." license before they can practice Naturopathy.

As a matter of fact these Respondents would like to point out that the Texas Basic Science Law actually prescribes the Basic Minimum Uniform Standards for a practitioner to practice the healing arts or any branch thereof in Texas; and these Respondents assert that in view thereof the Texas

Medical Practice Act is *not* the law in Texas which establishes the Minimum Uniform Standards for a practitioner to practice the healing arts or any branch thereof in the State of Texas. Permit the Respondents to discuss further the Texas Basic Science Law which is generously quoted in Appendix III of the Petitioners' Petition. As the Honorable Court will note this is *4590c, Vernon's Annotated Revised Civil Statutes of Texas, 1925, as amended to date.* Please note in Section 1 thereof the provision that "No person shall be permitted to take an examination for a license to practice the healing art or any branch thereof, or be granted any such license, unless he has presented to the Board or officer empowered to issue such a license as the applicant seeks, a certificate of proficiency in anatomy, physiology, chemistry, bacteriology, pathology, and hygiene and public health, hereinafter referred to as the basic sciences, issued by the State Board of Examiners in the Basic Sciences." Also note the provision in Section 2 of said Basic Science Law which defines the healing art, to-wit:

> "For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition. * * *"

Thus, this Honorable Court can easily see that the standard basic minimum uniform requirements to practice the healing arts or any branch thereof including Naturopathy is specifically provided for in the aforesaid Basic Science Law and not the Texas Medical Practice Act.

The Respondents would further like to take this opportunity to point out to this Honorable Court that the Texas Legislature has provided several statutes setting forth the requirements, etc., for the issuance of licenses to practice the healing art and its branches. These, by article number *(Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)* are as follows:

Medicine	Articles 4495-4512
Chiropractors	Article 4512b
Nurses	Articles 4513-4528b
Licensed Vocational Nurse	Article 4528c
Pharmacy	Article 4542a & b
Dentistry	Articles 4543-4551d
Dental Hygienists	Article 4551e
Optometry	Articles 4552-4566-1
Chiropody	Articles 4567-4575
Naturopathy	Article 4590d

Further, for the benefit of this Honorable Court, Respondents would like to point out the fact that the Legislature of Texas has recognized the differences and distinction between the healing art and its different branches, and has carefully identified them. At this time please permit the Respondents to quote three sections from the Healing Art Identification Act, *Article 4590e (Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)*:

"Art. 4590e. HEALING ART IDENTIFICATION ACT

"Title

"Section 1. This Act shall be known as the Healing Art Identification Act. The provisions of this Act shall not affect or limit in any way the application or use of

the principles, tenets, or teachings of any established church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided, further, that all those so ministering of offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members.

"The Healing Art Defined

"Sec. 2. For the purpose of this Art, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

"Healing Art Identifications

"Sec. 3. Every person licensed to practice the healing art heretofore or hereafter by either the Texas State Board of Medical Examiners, the State Board of Dental Examiners, the Texas Board of Chiropractic Examiners, the Texas State Board of Examiners in Optometry, the State Board of Naturopathic Examiners shall in the professional use of his name or any sign, pamphlet, stationery, letterhead, signature, or on any other such means of professional identification, written or printed, designate in the manner set forth in this Act the system of the healing art which is by his license permitted to practice. The following are the legally required identifications, one of which must be used by practitioners of the healing art:

"(1) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Medicine: physician and or surgeon, M.D.: doctor, M.D.: doctor of medicine, M.D.

"(2) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Osteopathy; physician and/or Surgeon, D.O.; Osteopathic physician and/or Surgeon; doctor, D.O.; doctor of osteopath; osteopath; D.O.

"(3) If licensed by the State Board of Dental Examiners: dentist; doctor, D.D.S.; doctor of dental surgery; D.D.S. doctor of dental medicine, D.M.D.

"(4) If licensed by the Texas Board of Chiropractic Examiners: chiropractor; doctor, D.C.; doctor of Chiropractic; D.C.

"(5) If licensed by the Texas State Board of Examiners in Optometry: optometrist; doctor, optometrist; doctor of optometry; O.D.

"(6) If licensed by the State Board of Chiropody Examiners: chiropodist; doctor, D.S.C.; doctor of surgical chiropody; D.S.C.

"(7) If licensed by the State Board of Naturopathic Examiners: naturopathic physician; physician, N.D.; doctor of naturopathy; N.D.; doctor, N.D."

Therefore, this Honorable Court can easily see that there are various standards, qualifications and identities for the various fields of the healing arts and its branches which are separate and apart from the basic minimum uniform standard requirements set forth for all the practitioners of the healing art and branches thereof. In other words, different standards and qualifications are recognized and apply to different fields of the healing arts and its branches; that is, certain requirements apply to one field that would not apply to others, and vice versa.

The Respondents respectfully suggest to this Honorable Court that inasmuch as Texas now has the Basic Minimum

Uniform Standards law (Basic Science Law) for all who are going to practice the healing art, or any branch thereof, that such Basic Science Law abrogates any effect whatsoever of the holding in the *Collins v. Texas* case, *223 U. S. 288 (1912)*, cited by the Petitioners in support of their proposition that the Texas Medical Practice Act is a reasonable regulation setting forth the Basic Minimum Uniform Standards which all must comply with before they can practice any branch of the healing art.

In reply to the next proposition of the Petitioners that the case of *Wilson v. State Board of Naturopathic Examiners, Civil App., 298 S. W. 2d 946, Writ of error refused, no reversible error, Supreme Court of Texas; Certiorari denied, 355 U. S. 870, rehearing denied, 355 U. S. 920*, and the case of *Schlichting v. Texas State Board of Medical Examiners, 158 Tex. 279, 310 S. W. 2d 557*, are definitive of the issues involved in this case. We submit that the *Wilson* case, supra, does not bring up the question of the unconstitutionality of the Texas Medical Practice Act, supra, insofar as the *Constitution of the United States* and the *14th Amendment* thereto are concerned, nor was the Federal Civil Rights Act involved. The *Schlichting* case, supra, was not taken to the Federal Court. Hence there was the necessity for the Honorable Court of Appeals to hold that there are substantial federal questions involved in the case at bar which need to be presented to a Three-Judge Federal District Court.

Inasmuch as the Petition for Writ of Certiorari mentions the *Wilson* case, supra, the Respondents would like to point

out some of the errors in that case to this Honorable Court. These Respondents submit that the *Wilson* case erroneously declared the *Texas Naturopathic Act (Article 4590d)* unconstitutional insofar as the Texas Constitution is concerned. The *Wilson* case admits that the practice of naturopathy is limited to certain means and excludes specific means (pp. 947, 948); it also states that the differences between the requirements of the regular Medical Practice (allopathic) Act and those of the Naturopathic Act are apparent and substantial (p. 950). Yet such case holds that Naturopaths must take the same examination as the regular physicians and surgeons (allopaths). Is this holding a preference in favor of the allopathic? The Respondents earnestly avouch that it is. Such holding discriminates against the naturopath, and makes a preference in favor of the allopaths, all of which is actually contrary to the provisions of the *Texas Constitution (Article XVI, Section 31)* which prescribes that "No preference shall ever be given by law to any school of medicine", and likewise such requirement is violative of the *XIV Amendment to the Constitution of the United States* which will be discussed later on in this Brief. Therefore in the opinion of the Respondents the Texas Naturopathic Act is actually constitutional rather than unconstitutional.

An Allopath is today's general medical doctor and surgeon who treats disease by any system or method (See *Words and Phrases, Permanent Addition, Vol. 3, Page 338; Bradbury v. Bardin, 34 Conn. 452, 453; The Winston Dictionary, The John C. Winston Company, Copyright 1957;*

Chambers Twentieth Century Dictionary, The New Mid-Century Version, edited by William Geddie, M.A.B. Sc. W & R Chambers, Ltd., Thistle Street, Edinburg, 6 Dean Street, London W, 1). While a Naturopath is limited to the system of treatment which is encompassed within the definition of a naturopathic doctor, whose occupation is defined in the Dictionary of Occupational Titles, U. S. Department of Labor, as follows:

> "DOCTOR, NATUROPATHIC (Medical Ser.) 0-52.21. naturopath. A HEALER. Diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods: Utilize dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity. Provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension; abnormalities of tissues, organs, muscles, joints, bones, and skin; pressure on nerves, blood vessels, and lymphatics; and assists patients in making adjustments of a mental and emotional nature. Naturopathy excludes the use of major surgery, x-ray and radium for therapeutic purposes, and use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life."

This Honorable Court will note that the Texas Medical Practice Act, Article 4510, is a law pertaining to the Allopaths who treat disease and disorders by any system or method; and this Honorable Court will further notice that to practice allopathy in the State of Texas under said Texas

Medical Practice Act that the applicant for a license under said Act has to be examined on general medical subjects and surgery which are practiced by the Allopaths or regular M.D. doctors as prescribed in Article 4503 of said Act. The Naturopaths, according to their tenets and teachings, and the philosophy of their limited branch of the healing art, do not practice the general field of medicine and surgery, but rather use the natural means of treatment by determining the cause of a patient's discomfort or illness or disease and removing such cause by natural restorative means to return the human body back to its normal balance and functions, thus eliminating the discomfort, illness or disease in the patient. It is also worthy of mention that a Naturopath does not treat communicable, quarantinable, acute, infectious maladies or diseases, such as smallpox, diphtheria, typhoid, scarlet fever, gonorrhea, syphilis, measles, mumps, whooping cough, etc. Of foremost importance, however, is the fact that the Naturopath does not study nor use surgery, toxic drugs, or x-ray for therapeutic purposes, and actually he does not champion the use of such methods to restore a person to good health; and some of the methods of treatment utilized by an Allopath (M.D.) are actually repugnant to and contrary to the tenets, teachings, philisophies and methods of treatment used by the Naturopaths, and many times the Naturopath has to step in and restore a human body to good health by natural treatment after an Allopath (M.D.) has exhausted all his remedies to cure a patient. It is, therefore, fundamental that to require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for general physicians

and surgeons would be a unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition; and this right to follow a recognized occupation is a right protected by the constitutional guaranties of liberty as set forth in the Fourteenth Amendment to the Constitution of the United States; and, therefore, these Respondents fervently appeal to this Honorable Court to refuse to review the opinion of the Honorable Court of Appeals because these Respondents do have a substantial federal question involved in this case which they are entitled to present to a Three-Judge District Court and to seek a judgment holding that insofar as the Texas Medical Practice Act, supra, affects the practice of naturopathy, the act is unconstitutional and void; and that so far as said act affects allopathy or the general practice of medicine and surgery it is valid. See *State of Idaho ex rel., State Board of Medicine of the State of Idaho, S. M. Poindexter v. David Smith (Supreme Court of Idaho, April 8, 1959), 337 Pacific 2d 938-942.* This latter case is so directly in point that the pertinent portions thereof are quoted and set forth in Appendix I of this Brief; and the attention of the Honorable Justices of this Court is invited to this Appendix because such opinion is squarely in consonance with the principles averred by the Respondents herein.

These Respondents further appeal to this Honorable Court to recognize their constitutional rights and respectfully suggest to this Honorable Court that the decision of the Honorable Court of Appeals in this case should not be

reviewed by this Honorable Court because of the holding of this Honorable Court and the said Honorable Court of Appeals in the case of *England et al. v. Louisiana State Board of Medical Examiners et al. (Fifth Circuit—September 9, 1958), 259 F.2d 626 (Fifth Circuit on rehearing—January 23, 1959), 263 F. 2d 661 (Supreme Court—June 1, 1959), 359 U. S. 1012, 3 L. Ed. 2d 1036, 79 S. Ct. 1149.* In this latter case this Honorable Court holds that the state may regulate, within reasonable bounds, a recognized useful, limited system of the healing art, but it cannot prescribe such arbitrary and unreasonable requirements which will contravene the Constitution and laws of the United States and amount to a denial of due process or of equal protection of the laws under the Fourteenth Amendment. This latter case is a Chiropractor case, which involves a limited non-surgical practice of medicine such as a Naturopath; and this Honorable Court and the Honorable Court of Appeals holds that the practitioners of such limited system of the healing art have a right to come to Court and show whether or not the requirement of a state statute whereby such practitioners are required to be examined upon the general subjects, including surgery, which are required for an Allopathic physician and surgeon to pass and obtain a license, amounts to a denial of their rights to follow a lawful occupation which is guaranteed to them under the Fourteenth Amendment to the Constitution of the United State... This is all that the Respondents seek, that is, their day in Court to prove their rights.

There is not a more substantial federal question than the question which involves the freedoms and liberties of the people of the United States, because this is the very precept upon which this country was founded and upon which the Constitution of the United States and its amendments are based.

Why should the entire field of the healing art be given over to the Allopaths?

The opinions of the majority of the Court in the *England* case, supra, are masterpieces. The illuminating, sagacious and fundamental statements contained in the foregoing opinions marks the first time that a Court has undertaken to understand and develop the true meaning and need for medical freedom. These opinions herald a return of medical freedom and a wresting of the healing art from the monopolistic grip thereon that the Allopaths have stealthily gained. The Allopaths have so dominated and controlled the healing art that the modern generation knows of practically no medical treatment other than by drugs or surgery; sight has nearly been lost by today's generation of the highly successful cures of illness by the restoration of the human body to natural health by treatment by natural means as practiced by the Naturopaths. The Naturopaths whose philosophy is to treat the cause of illness by natural methods to put the human body back in balance and thus eliminate or prevent the illness is an age-old philosophy of medicine that should be preserved, and it should not be allowed to be strangled and destroyed by the Petitioners. The aforesaid opinions in the *England* case,

supra, are like the rising of the sun on a new day for the natural health and happiness of the people of our nation.

These Respondents are entitled to the protection of their liberties and freedom and rights to pursue their lawful profession as guaranteed to them by the Constitution of the United States and its amendments and they are entitled to have their injunction against the Attorney General of the State of Texas, the Texas Medical Board and the District Attorney of Dallas County, Texas, from interfering with these liberties, freedoms and rights and the action of the Court of Appeals in reversing the judgment of the District Court and remanding the case for a trial before a Three-Judge District Court is proper in order that these most substantial federal questions which are involved in this case can receive full consideration and so that the Three-Judge District Court can render a proper decision on this very vital subject which has nation-wide interest and which affects the health and welfare of so many people throughout our Country. These Respondents truly believe that the decision of the Court of Appeals is correct and that this Honorable Court need not grant its Writ of Certiorari because these Respondents are entitled to have their day in Court so that they will be able to duly show and prove to the satisfaction of a Three-Judge District Court that their liberty, freedom and rights are in jeopardy, and which liberty, freedom and rights are guaranteed and protected by the United States Constitution, particularly the *Preamble, Section 2 of Article IV, Article VI,* and *Section 1 of the Fourteenth Amendment* to such Constitution together with the anti-trust laws of the United

States. And further, these Respondents enunciate that if *Section 31 of Article 16 of the Constitution of the State of Texas* as construed by the Supreme Court of Texas denies these Respondents their aforesaid rights, then the Three-Judge District Court should declare that portion of the Constitution of the State of Texas unconstitutional.

These Respondents suggest to this Court that a Three-Judge District Court could not consider more substantial Federal questions than the ones involved in this case.

WHEREFORE, these Respondents pray that because of the matters and grounds set forth in the foregoing Brief that the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 11, 1961 should not be reviewed by this Court.

Respectfully submitted,

JAMES L. MCNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
Counsel for Respondents.

PROOF OF SERVICE

I, JAMES L. McNEES, JR., the Counsel for the Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the day of October, A.D. 1961, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Petitioners by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Leon F. Pesek, Esquire, the Counsel of record for Petitioners, with such envelope addressed to Honorable Leon F. Pesek, Assistant Attorney General of Texas, Capitol Station, Austin, Texas.

JAMES L. McNEES, JR.

APPENDIX I

No. 8737

STATE OF IDAHO *ex rel.*, STATE BOARD OF MEDICINE of the State of Idaho, S. M. Poindexter, Chairman,
Plaintiff-Appellant,

v.

DAVID SMITH,
Defendant-Respondent.

Supreme Court of Idaho.
April 8, 1959.

Action by state to enjoin defendant from advertising himself as naturopathy doctor on ground that he was not licensed to engage in practice of medicine and surgery or other healing art. The District Court, Ada County, Doran H. Sutphen, J., sustained defendant's demurrer, and state appealed. The Supreme Court, Bellwood, J., held that complaint did not state facts sufficient to constitute cause of action.

Affirmed.

* * * * *

On February 21, 1955, appellant filed its Second Amended Complaint in which it is alleged, among other things:

"II

"That Defendant, David Smith, is a resident of Ada County, State of Idaho, and that he is not now, and never has been, the holder of a license to practice medicine and surgery in the State of Idaho and is not now and never has been the holder of a license to practice any of the healing arts in the State of Idaho.

"III

"That Defendant presently advertises, in the manner alleged in Paragraph VI of this Second Amended Complaint, in Ada County, State of Idaho, as one being willing and able to investigate and diagnose both real and imagined mental and physical ailments of the human body, of the types commonly investigated and diagnosed by practicing naturopathic doctors in Idaho, with the view of relieving the same.

"IV

"That Defendant presently advertises in Ada County, State of Idaho, as one being willing and able to treat both real and imagined mental and physical ailments of the human body, with the view of relieving the same by methods commonly employed by practicing naturopathic doctors in Idaho.

"V

"That naturopathic doctors in Idaho, in treating real and imagined mental and physical ailments of the human body with the view of relieving the same, commonly employ physical culture and drugless treatment of disease (other than surgery) by all known methods supposed to stimulate or assist nature, as for example, by the use of light, air, water, heat, rest, diet, herbs and massage.

"VI

"That Defendant advertises himself as a practicing naturopathic doctor, as alleged in Paragraphs III, IV and V of this Second Amended Complaint, by maintaining a sign on the door of a building located at 6102 Fairview Avenue near the northwesterly boundary of Boise City, Ada County, Idaho, said sign reading as follows:

" 'David W. Smith, N.D.
Hours by Appointment
Entrance'

"and causing to be maintained in the current (Fall) edition of the Boise Telephone Directory of the Mountain States Telephone and Telegraph Company the following entries:

" 'Smith David W. natrpthc phys
6112 Fairview av—4-3681'
(page 63 of the Directory)

and

" 'Naturopathic physicians
* * * * *
Smith David W. 6112
Fairview av—4-3681'
(page 91 of the Directory)

"VII

"That Defendant threatens to continue to advertise in the manner set forth in Paragraphs III, IV, V and VI of this Second Amended Complaint.

"VIII

"That, unless restrained and enjoined from so doing, the continuation of the acts mentioned in Paragraphs III, IV, V, VI and VII of this Second Amended Complaint would endanger the public health, safety and welfare in Ada County, Idaho."

By the second amended complaint the appellant seeks (1) an adjudication that the acts of the respondent thus alleged constitute the practice of medicine and surgery or the practice of one or more of the other healing arts for which the State of Idaho requires licenses, and (2) a permanent injunction restraining the respondent from advertising as thus alleged.

On February 25, 1955, respondent filed a two-part demurrer to the second amended complaint (1) that it does not state facts sufficient to constitute a cause of action against

respondent, and (2) that it is ambiguous, unintelligible and uncertain in enumerated particulars; and a motion to strike therefrom paragraphs III, IV, V, VI, VII and VIII.

On June 11, 1957, the district court sustained "said demurrer" * * * "without leave to plaintiff (appellant) to amend" and granted the motion to strike as regards paragraphs III, IV, VI, VII and VIII. There followed the district court's judgment of dismissal of the second amended complaint and the action based thereon, from which this appeal is taken. Among other charges of error, appellant urges that the district court erred in sustaining the demurrer and not overruling the same.

Chapter 18, Title 54, I.C., regulates the practice of medicine and surgery. Section 54-1802, I.C., provides in pertinent part as follows:

> "(a) Any person shall be regarded as practicing medicine and surgery who shall advertise in any manner, or hold himself or herself out to the public, as a physician and surgeon, or either, or who shall investigate, diagnose or treat, or offer to investigate, diagnose or treat, any physical or mental ailment or disease, real or imagined, of any person with a view to relieving the same, as is commonly done by physicians and surgeons, or suggest, recommend, prescribe or direct for the use of any person, sick, injured or deformed, any drug, medicine, means or appliance for the intended relief, palliation or cure of the same, or who shall suggest, recommend, prescribe or direct an operation on any such sick, injured or deformed person or who shall perform, or offer to perform, any such operation whether or not such person receives therefor, either directly or indirectly, any fee, gift or compensation of any kind whatsoever or in any manner whatsoever: Provided, however, that the

> definition of the practice of medicine and surgery as defined above shall not be construed to include the practice by any person of a healing art which is a system or mode of treating the sick or afflicted which is, or may hereafter be, licensed under the laws of this state if the person practicing such healing art holds a license from the state entitling him to engage in the practice of such healing art, including licensed pharmacists while engaged in the practice of their profession; and provided further, that the provisions of this act shall never be construed to affect in any manner the practice of the religious tenets of any church or religious belief. * * *"

Section 54-1803, I.C., makes it unlawful to practice medicine and surgery without a license, and Section 54-1815, I.C., authorizes injunctions to restrain violations.

Chapters 7 and 16 of Title 54, I.C., regulate chiropractic and osteopathy, respectively.

Naturopathy is not expressly regulated or licensed by the Idaho Code.

Appellant contends that the practice of medicine and surgery (Sec. 54-1802, supra) includes every aspect of each and every branch of the entire healing art except those separately licensed; that insofar as the practice of chiropractic or osteopathy covers naturopathy, the latter, to the extent covered, can be practiced only by the holder of a license in the covering field of healing; that insofar as naturopathy is not thus covered by such practices, it is covered by the all-inclusive field of medicine and surgery, and thus, to that extent requires a license in medicine and surgery; and finally, that Chapter 18 of Title 54, I.C., as it thus regulates or relates

to naturopathy, is a constitutional exercise of the police powers in its requirement that practicing naturopaths must hold a license in a healing art.

With appellant's contentions we cannot agree. Principles applicable here, and controlling, have appeared heretofore in this Court's decisions.

[1] The substance of the second amended complaint is that the respondent is holding himself out as a naturopathic doctor or physician and that he is threatening and advertising that he is engaging and will continue to engage in the practice of naturopathy. While it is primarily a legislative prerogative to determine what constitutes permissible practice of naturopathy or define what naturopathy is, it would not be admiss to examine the same. Webster's New International Dictionary, 2nd Ed., provides the following definitions:

> Naturopathy: (L. *natura*, nature + pathy) a system of physical culture and drugless treatment of disease by methods supposed to simulate or assist nature.
>
> Pathy : A system of treating disease.

The American Illustrated Medical Dictionary, 22nd Ed., provides the following definition:

> Naturopathy: A drugless system of therapy by the use of physical forces, such as air, light, water, heat, massage, etc.

The legislature, by Section 54-1802, supra, has defined the practice of medicine and surgery.

By Section 54-712, I.C., the legislature has defined the practice of chiropractic as follows:

> "Any licentiate under this chapter may adjust any displaced segment of the vertebral column or any displaced tissue of any kind or nature, for the purpose of removing occlusion of nerve stimulus in the bodies of human beings, and practice physiotherapy, electrotheraphy, hydrotheraphy, as taught in chiropractic schools and colleges, but nothing herein contained shall allow any licentiate to prescribe medicine, perform surgical operations or practice obstetrics."

While the legislature has provided regulatory measures for the practice of osteopathy, it has not defined the same. But in State v. Sawyer, 36 Idaho 814, 214 P. 222, among several definitions we find the following:

> "Osteopathy * * * is a system of treating diseases of the human body without drugs and by means of manipulation."

[2] From these definitions of the practices of medicine and surgery, chiropractic and osteopathy, it must be evident that the calling or profession of one differs materially from the calling or profession of the others; that the system of healing employed by the naturopath has little in common with that employed by the physician and surgeon, the chiropractor or the osteopath; and that while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath, the chiropractor and the osteopath are limited in their treatments to their particular systems. Naturopathy may not be as generally

known as the three branches of the healing art just referred to, but it has been and is recognized as a separate and distinct system of the healing art.

[3] No persuasive reason has been assigned, nor is one indicated for departing from the principles pronounced in State v. Armstrong, 38 Idaho 493, 225 P. 491, 33 A.L.R. 835, and State v. Fite, 29 Idaho 463, 159 P. 1183. Whether the question occupation be chiropody, as in the Armstrong case, or naturopathy, as in this case, the principles are equally applicable. The right to follow a recognized occupation is a right protected by the constitutional guarantees of liberty. Fourteenth Amendment to the Federal Constitution; Idaho Constitution, Art. 1, Sec. 13; Berry v. Summers, 76 Idaho 446, 283 P. 2d 1093.

[4-6] A calling may not be prohibited unless it is inherently injurious to the public health, safety or morals, or unless it has a tendency in that direction. State v. Armstrong, supra. Here the respondent is not in anywise holding himself in the capacity of a physician or surgeon, a chiropractor, or an osteopath; he holds himself out as a practitioner of the recognized branch of the healing are designated naturopathy. If the naturopath is limited in his practice to the use of a system of physical culture and drugless treatment by methods supposed to stimulate or assist nature, or to the use of physical forces such as air, light, water, heat, massage, and other similar simple matria medica, the system cannot be inherently injurious or have a tendency in that direction. Nothing is indicated which would justify prohibit-

ing naturopathy. And appellant disclaims any such intention on the part of the legislature. Naturopathy does bear some relation to the public health, and there can be no question but that the legislature has power to regulate all callings related to the public health. The contention is that naturopathy is regulated by Chapter 18 of Title 54, I.C., by requiring that a naturopath obtain one of the different sorts of licenses provided by law such as that for a physician and surgeon, a chiropractor, or an osteopath.

[7, 8] To require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for physicians and surgeons would be an unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition. So far as Section 58-1802, I.C., affects the practice of naturopathy, the act is unconstitutional and void. So far as it affects the branches of the healing art licensed by the statutes and all callings or practices sufficiently related to fall within them, it is valid.

[9] We adhere to and approve in this case the principles announced in the Armstrong and Fite cases above cited, and conclude that the respondent's demurrer was correctly sustained below. By virtue of the foregoing, it is unnecessary to consider the lower court's ruling on respondent's motion to strike; even so, the ultimate result would remain unaffected.

The judgment of dismissal of appellant's second amended complaint is affirmed.

Costs to respondent, I.C. Sections 54-1809, 54-1815; Snake River Mutual Fire Insurance Co. v. Neill, Idaho, 336 P. 2d 107.

TAYLOR, SMITH, KNUDSON and McQUADE, JJ., concur.

PORTER, C. J., not participating.